



BRB No. 19-0190
OWCP Nos. 13-104998, 13-092938 and 13-105668

ROBERT CARRION)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 04/17/2019
SSA TERMINALS, LLC)	
)	
and)	
)	
HOMEPORT INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	ORDER

Claimant appeals the Order Denying Claimant’s Request for a Supplemental Order Declaring Default of District Director R. Todd Bruininks in a case arising under the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §901 *et seq.* (the Act) Employer has filed a Motion to Dismiss claimant’s appeal in this case, contending it is not properly before the Board as the district director referred the case to the Office of Administrative Law Judges (OALJ) for resolution of factual disputes. The Director, Office of Workers’ Compensation Programs (the Director), also filed a brief urging dismissal of claimant’s appeal. Claimant filed a response opposing the motion to dismiss.

An administrative law judge awarded claimant temporary total disability benefits for a cumulative trauma knee injury commencing March 1, 2002, “until he is no longer temporarily totally disabled under the Act (presumably the date on which he recovers from

knee replacement surgery).”¹ Decision and Order Awarding Benefits (Nov. 9, 2011) at 49. The Board affirmed the administrative law judge’s decision. *Carrion v. SSA Marine Terminals, LLC*, BRB Nos. 12-0601/A (June 25, 2013) (unpub.). Claimant and employer both appealed to the United States Court of Appeals for the Ninth Circuit, which held that claimant was permanently totally disabled from the time of his injury. *SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016). Thereafter, claimant filed a motion seeking to have the court amend its opinion to explicitly award permanent total disability benefits. The Ninth Circuit denied the motion.

On June 29, 2017, claimant filed a petition with the district director to declare employer in default under Section 18(a) of the Act, 33 U.S.C. §918(a),² on the ground that employer was not paying claimant ongoing permanent total disability benefits. In his motion for a default order, claimant sought enforcement of an ongoing award of permanent total disability benefits from March 1, 2002, plus an assessment pursuant to Section 14(f), 33 U.S.C. §914(f). In response, employer asserted that it had paid claimant benefits in the amount of \$488,526.84 in 2011, which exceeds its liability. Employer also asserted that there is no compensation order addressing the nature and extent of claimant’s disability after he underwent knee surgery.

The district director issued an Order denying claimant’s request for a supplemental order declaring default. He found that the administrative law judge had awarded claimant total disability benefits “until he is no longer disabled” and that the Ninth Circuit expressly declined to enter an award of ongoing benefits. The district director found it is not possible to calculate the correct amount of compensation due without resort to extra-record facts because there are no findings of fact as to when claimant recovered from his knee surgery and what the nature and extent of his disability are upon that recovery. Order at 2-3. The district director therefore denied the motion for a default order and referred the case to the OALJ for findings of fact.

Claimant appeals the district director’s Order. Employer filed a motion to dismiss the appeal, with which the Director agrees, contending that the district director’s Order is not a final appealable order.

¹ Claimant underwent knee replacement surgery in February 2010 after the record in this case had closed.

² Section 18(a) allows a claimant to seek enforcement of a compensation order by applying to the district director for a supplemental order declaring default within one year of an alleged default in payment of compensation. 33 U.S.C. §918(a).

We agree with employer and the Director that claimant's appeal is not properly before the Board. The Board has jurisdiction over an appeal of a district director's refusal to issue a default order only where no factual issues are in dispute. *See Durham v. Embassy Dairy*, 19 BRBS 105 (1986). The regulation at 20 C.F.R. §702.372(a) provides that on receipt of an application for an order declaring an amount in default, the district director should refer the matter to an administrative law judge for resolution where the parties are not in agreement following informal proceedings. 20 C.F.R. §§702.316; 702.372(a); *see also Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341(CRT) (5th Cir. 1981). If a question arises as to the interpretation or clarification of findings made in a final compensation order, a case must go to an administrative law judge for findings of fact before a district director can determine if an employer is in default. *Brown v. Avondale Industries, Inc.*, 46 BRBS 1, 3 (2012).

The district director correctly found that there is no enforceable order as to claimant's compensation rate with respect to ongoing benefits and that factual issues exist that must be addressed by an administrative law judge. *See, e.g., Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000). It is well established that a compensation order is not enforceable if it does not adequately state the amount of compensation owed to a claimant without resort to extra-record facts. *Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008); *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992). In this case, the Ninth Circuit held that claimant is entitled to permanent total disability benefits from the date of injury but did not explicitly award continuing compensation for permanent total disability nor did it remand the case with directions for the administrative law judge to award ongoing permanent total disability benefits. In addition, the amount of compensation owed claimant is uncertain because the Ninth Circuit indicated that claimant's extent of disability may well change after he recovered from his knee replacement surgery. *Carrion*, 821 F.3d at 1174, 50 BRBS at 64(CRT). Employer alleged it has overpaid claimant and it submitted a progress report from claimant's physician regarding his recovery from his knee surgery and an employability report. These reports indicate questions of fact exist as to the extent of claimant's disability after his recovery from knee surgery.

The district director correctly concluded that the amount of compensation due claimant after his knee surgery cannot be ascertained from the existing decisions. He therefore referred the case to the OALJ for the resolution of factual issues and the issuance of a compensation order. 33 U.S.C. §919(c), (d); *see, e.g., Stetzer*, 547 F.3d 459, 42 BRBS 55(CRT); *Brown*, 46 BRBS 1; *Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988). As this case was properly referred to the OALJ, the Board lacks jurisdiction over claimant's appeal of the district director's Order. Therefore, we grant employer's motion to dismiss claimant's appeal.

Accordingly, we dismiss claimant's appeal.³

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

³ Thus, claimant's motion for an extension of time in which to file his Petition for Review and brief is denied as moot.