

BRB No. 01-0870

SPENCER K. JENKINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>August 8, 2002</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order of Dismissal of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order of Dismissal (01-LHC-0793) of Administrative Law Judge Daniel A. Sarno, Jr., 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 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his right knee on August 10, 1999, during the course of his employment as a shipfitter. Claimant underwent arthroscopic knee surgery on September 21, 1999. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from September 21 to November 9, 1999. A medical report dated December 12, 2000, states that claimant's right knee reached

maximum medical improvement on April 24, 2000, and that it was determined, on August 2, 2000, that claimant sustained a five percent knee impairment with permanent work restrictions. See Motion to Dismiss, Ex. A at 8.

Appended to claimant's appeal is a letter from his attorney to employer's workers' compensation office dated June 12, 2000.¹ The letter states that attached is a medical report linking a second knee condition, a neuropathic abnormality, to claimant's work-related knee injury. The letter further states that attached are medical bills related to treatment of this condition, and it requests compensation for temporary total disability for claimant from February 9 to 11, February 17 and 18, and March 16 and 17, 2000. Cl.'s Brief, Attachments at 2. On October 24, 2000, claimant submitted a letter to the district director requesting an informal conference regarding payment of the requested compensation and claimant attached a Pre-Hearing Statement, LS-18, stating as the sole issue in dispute was the temporary total disability alleged in claimant's June 12, 2000, letter. *Id.* at 3, 3-1. Neither the October 24, 2000, letter nor the attached LS-18 mentions a neuropathic condition arising from the August 10, 1999, work injury. On December 14, 2000, the claim was transferred for a hearing to the Office of Administrative Law Judges (OALJ). *Id.* at 6, 6-2. Pursuant to the administrative law judge's Pre-Hearing Order, claimant's attorney informed the administrative law judge on January 31, 2001, that claimant alleged a work injury on October (*sic*) 10, 1999, and he claimed compensation for temporary total disability for the days stated in claimant's LS-18. *Id.* at 7.

On February 27, 2001, claimant wrote to the district director and requested an informal conference regarding payment of compensation for permanent partial disability, 33 U.S.C. §908(c)(2), for the knee injury, pursuant to the August 2, 2000, impairment rating of five percent. Employer mailed claimant's attorney that same day proposed stipulations for the purpose of obtaining an order from the district director compensating claimant for a five percent knee impairment. *Id.* at 8-9. Claimant and his attorney executed the proposed stipulations on March 16, 2001. On April 24, 2001, the district director issued a Compensation Order, pursuant to the parties' stipulations, awarding claimant compensation for a five percent permanent partial disability of the right leg.

Employer filed a Motion to Dismiss with the administrative law judge on July 16, 2001. Employer asserted that, in the stipulations submitted to the district

¹No exhibits were admitted into the record as the administrative law judge dismissed the claim prior to the date of the formal hearing.

director, the parties agreed upon all material facts, leaving no issues before the administrative law judge. Specifically, the stipulations conclude, “[T]hat the claimant has incurred no other disability and no other loss of wage-earning capacity to date, beyond that reflected in these Stipulations.” Motion to Dismiss, Ex. A at 7. Moreover, employer noted that, in their stipulations, the parties waived a formal hearing and consented to the issuance of a formal order. *Id.* Claimant responded to employer’s motion on July 23, 2001, and, on July 24, 2001, claimant submitted to employer and the administrative law judge proposed stipulations and exhibits for the formal hearing scheduled for August 7, 2001. These documents state that the unresolved issues are the cause of claimant’s neuropathic abnormality, his entitlement to treatment for this condition by Dr. Marsteller and to temporary total disability resulting from this condition for the days listed in claimant’s LS-18. On July 25, 2001, the administrative law judge issued his Order of Dismissal.

In his Order, the administrative law judge found that claimant did not mention a neuropathic condition in his LS-18, or in his correspondence with the district director. The administrative law judge also agreed with employer that, in their stipulations, the parties resolved all issues regarding the dates of claimant’s disability and further agreed to waive a hearing upon issuance of an order by the district director. Accordingly, the administrative law judge granted employer’s motion, cancelled the scheduled hearing, and dismissed the claim.

On appeal, claimant asserts the administrative law judge erred by dismissing his claim. Employer responds, urging affirmance.

We agree with claimant that the administrative law judge erred in dismissing his claim. While employer’s motion to dismiss is based on the assertion that all issues were resolved, it is evident from claimant’s response to employer’s motion to dismiss that the stipulated agreement concerned claimant’s entitlement to permanent partial disability benefits for the five percent leg impairment. The stipulations did not address the unresolved issues listed by claimant concerning his neuropathic abnormality, including entitlement to treatment and to specified days of temporary total disability. Although the parties agreed before the district director that a formal hearing was not necessary, the agreement appears only to address claimant’s entitlement to scheduled permanent partial disability benefits. As the other issues involved different types of benefits than those covered by the stipulations and remained unresolved, the administrative law judge erred in dismissing the claim without further inquiry.

Moreover, even if the district director’s Compensation Order were construed as covering the issues claimant presents, the claim could still be reopened before

the administrative law judge. The district director's Order did not constitute an approved Section 8(i) settlement, 33 U.S.C. §908(i). Thus, the claim, already before the administrative law judge at the time the Compensation Order was issued, is subject to Section 22 modification by the administrative law judge based upon a showing of a mistake in fact or change in conditions.² 33 U.S.C. §922; *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988); *Sans v. Todd Shipyards Corp.*, 19 BRBS 4 (1986). In addition, claimant did not withdraw his claim, but timely responded to employer's motion to dismiss, listing specific issues remaining in dispute. See 20 C.F.R. §702.225. Thus, neither the parties' stipulations nor the district director's Order can serve as a basis for the administrative law judge's dismissal of claimant's claim.

It is apparent from claimant's correspondence with the administrative law judge that there were unresolved issues of causation, medical care, and extent of disability resulting from the alleged work-related neuropathic condition. Even if claimant did not explicitly note the alleged neuropathic condition in his LS-18, he did so in responding to employer's motion to dismiss. As the case was properly before the administrative law judge, he had a duty to address the issues remaining in dispute. See generally *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994). Where questions of fact are raised, the administrative law judge must hold an evidentiary hearing. 20 C.F.R. §§702.331-350; 29 C.F.R. §18.41(b); see also 33 U.S.C. §§919, 923(a); *Sans*, 19 BRBS 4. The Board has affirmed an administrative law judge's decision to retain jurisdiction where the parties are not in agreement as to whether an issue remains in dispute. *Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988). Claimant's response to employer's motion to dismiss raised unresolved issues of fact and was therefore sufficient to warrant a hearing on the merits before the administrative law judge. See *Falcone*, 21 BRBS at 147; see also 20 C.F.R. §702.338. Therefore, we reverse the administrative law judge's dismissal of claimant's claim, and remand this case for a hearing on the merits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

²In fact, attached to employer's response brief are copies of claimant's motion for modification. Employer's contention, raised in a footnote, that the Board should dismiss claimant's appeal and remand for modification proceedings, is moot based on our disposition of this case.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge