

EARL F. QUINN (Decedent))
)
 Claimant)
 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: Feb. 13, 2004
 AND DRY DOCK COMPANY)
)
 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 Granting Motion to Dismiss of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Kathleen H. Kim (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Motion to Dismiss (2003-LHC-0446) 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 was employed as a pipefitter and yard maintenance man at employer's facility from 1947-1955, and from 1960-1990, and subsequently retired. Thereafter, claimant filed a disability claim under the Act after he was diagnosed with work-related pulmonary asbestosis on October 5, 1999. Employer filed a notice of controversion. On August 29, 2000, employer requested relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f), on claimant's disability claim, noting that the date of maximum medical improvement was October 5, 1999. Dir. Ex. 1. On September 1, 2000, employer entered into stipulations of fact with claimant and applied for an order of compensation from the district director awarding claimant permanent partial disability benefits from October 5, 1999, and continuing. Dir. Ex. 3. By letter dated September 14, 2000, the district director acknowledged receipt of employer's application for Section 8(f) relief but denied it because it failed to meet the requirements of the contribution element set out in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT)(4th Cir. 1998). Dir. Ex. 2. The district director by that letter advised employer to submit its LS-18 pre-hearing statement if Section 8(f) relief was to be pursued. *Id.* Employer did not file its LS-18 in response to this letter.

On March 14, 2001, the district director awarded claimant permanent partial disability benefits from October 5, 1999, and continuing, in accordance with the stipulations of the private parties. Dir. Ex. 4; 33 U.S.C. §908(c)(23); 20 C.F.R. §702.315. Employer's entitlement to Section 8(f) relief was not addressed in the district director's compensation order. *Id.* Claimant died on September 6, 2001. Dir. Ex. 5. Thereafter, a death benefits claim was filed. Employer filed a second Section 8(f) application on November 16, 2001, on the death benefits claim, and it renewed its request for Section 8(f) relief on the disability claim. Dir. Ex. 5. On March 12, 2002, the district director advised employer that Section 8(f) relief would be granted on the death benefits claim only.¹ Dir. Ex. 6.

¹The standards of proof are different in disability and death cases. In the instant post-retirement occupational disease case where permanent partial disability benefits were awarded, employer must establish that claimant had a pre-existing permanent partial disability and that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. In the death claim, employer must establish that the employee had a pre-existing permanent partial disability prior to his work-related death and that the death was not due solely to the work injury but was contributed to or hastened by the pre-existing condition. *See Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT)(4th Cir. 1998). If Section 8(f) applies to both the disability and death claims,

On May 15, 2002, employer filed its LS-18 form regarding the issue of Section 8(f) relief on the disability claim and requested the case's transmittal to the Office of Administrative Law Judges (OALJ) for a formal hearing if the district director was not satisfied that its additional medical evidence established the contribution element. Dir. Ex. 7. Subsequently, the case was referred to the OALJ for a formal hearing. Dir. Ex. 12. The sole issue to be addressed at the hearing was employer's entitlement to Section 8(f) relief on claimant's disability claim. *Id.* Prior to the hearing, the Director, Office of Workers' Compensation Programs (the Director), filed a motion to dismiss, asserting that employer's request for Section 8(f) relief on the disability claim should be denied. Employer opposed the Director's motion. After discussing the procedural history of the case and the holding in *Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106 (1998), upon which the Director relied in support of his motion, the administrative law judge granted the Director's Motion to Dismiss, and denied employer Section 8(f) relief on the disability claim.

On appeal, employer challenges the administrative law judge's denial of its request for Section 8(f) relief on the disability claim and his granting of the Director's motion to dismiss. The Director responds in support of the administrative law judge's decision.

A Section 8(f) claim must be "litigated" in the same proceeding wherein permanent disability is at issue, absent a showing of special circumstances. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *American Bridge Div., U.S. Steel Corp. v. Director, OWCP*, 679 F.2d 81, 14 BRBS 923 (5th Cir. 1982), *aff'g Carroll v. American Bridge Div., U.S. Steel Corp.*, 13 BRBS 759 (1981); *Serio*, 32 BRBS 106; *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998); *Avallone v. Todd Shipyards Corp.*, 13 BRBS 348 (1981), *review denied*, 672 F.2d 901 (2^d Cir. 1981); *Wilson v. Old Dominion Stevedoring Corp.*, 10 BRBS 943 (1979); *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979). Once a compensation order becomes final, the only means of reopening the claim is to petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, and the party seeking modification must establish that there has been a change in the claimant's condition or a mistake in a determination of fact. *See Director, OWCP v. Edward Minte Co., Inc.*, 803 F.2d 731, 19 BRBS 27(CRT)(D.C. Cir. 1986), *aff'g Dixon v. Edward Minte Co., Inc.*, 16 BRBS 314 (1984); *see also Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155(CRT) (11th Cir. 1985); *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

In *Serio*, 32 BRBS 106, the private parties stipulated before the administrative law judge that claimant, a retiree, had a 25 percent pulmonary impairment and was entitled to permanent partial disability benefits. After the formal hearing, employer withdrew its

employer's liability is limited to one period of 104 weeks. *See Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

request for Section 8(f) relief, and the administrative law judge issued a decision awarding claimant the benefits to which the parties stipulated. Almost a year later, employer renewed its request for Section 8(f) relief by way of a petition for modification. The Board held that employer's claim for Section 8(f) relief was waived by virtue of its withdrawal of the issue following the initial hearing at which the permanency of claimant's condition was adjudicated.

Upon consideration of the record evidence, the administrative law judge's decision, and the parties' briefs, we affirm the administrative law judge's dismissal of employer's request for Section 8(f) relief on claimant's disability claim. The administrative law judge's conclusion that employer was precluded from seeking Section 8(f) relief on the disability claim after it failed to fully "litigate" its Section 8(f) claim prior to the entry of the order awarding permanent disability benefits is in accordance with law and thus is affirmed. Although a formal hearing to determine claimant's entitlement to permanent disability benefits was not held, as employer points out, the permanent disability claim was "litigated" before the district director in that claimant and employer entered into stipulations of fact in lieu of evidence and the district director issued a compensation order embodying these stipulations, after employer was on notice that its Section 8(f) claim had been denied. Similarly, in *Serio*, 32 BRBS 106, the claimant's entitlement to permanent disability benefits was resolved by way of stipulations. Moreover, the administrative law judge rationally concluded that employer's failure to object to the district director's September 14, 2000, denial of Section 8(f) relief, until May 15, 2002, constitutes a waiver of its right to claim Section 8(f) relief on claimant's disability claim; thus, we affirm this conclusion. *See generally Verderane*, 772 F.2d 775, 17 BRBS 155(CRT); *Serio*, 32 BRBS 106; Decision and Order at 6; Dir. Exs. 2, 7. Despite the fact that, as employer asserts, there is no specific statute of limitations regarding when a party should request a hearing of the district director's recommendation that Section 8(f) relief be denied, the administrative law judge rationally determined that employer waived the Section 8(f) issue by not filing its LS-18 as instructed, and allowing a compensation order awarding claimant permanent disability benefits to become final with no disposition of the Section 8(f) issue. As the administrative law judge aptly stated, "The bottom line is that Employer failed to preserve its right to seek §8(f) relief by not submitting an LS-18 or requesting a formal hearing on the issue after the [district] [d]irector's initial denial of the application, and prior to entering into stipulations and a compensation order for permanent disability." Decision and Order at 6 n. 7.

Employer does not challenge the administrative law judge's findings that no special circumstances permit its Section 8(f) application to be considered and that employer did not seek modification of the district director's compensation award. *See* Decision and Order at 6. Thus, these conclusions are affirmed as unchallenged on appeal.

Accordingly, the administrative law judge's Decision and Order Granting Motion to Dismiss employer's request for Section 8(f) relief on claimant's disability claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge