BRB No. 03-0392

JOHN R. SHOOK	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Feb. 25, 2004
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Director's Motion to Dismiss Employer's Application for Section 8(f) Relief of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

Kathleen H. Kim (Howard M. 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, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Order Granting Director's Motion to Dismiss Employer's Application for Section 8(f) Relief (02-LHC-0858) of Administrative Law Judge Fletcher E. Campbell, 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The facts underlying this appeal are not in dispute. Claimant, a pipe welder, was employed by employer from 1943 to 1944 and again from 1951 to 1970 during which time he was exposed to asbestos. He was diagnosed with asbestos-related lung disease on February 17, 2000, and sought benefits under the Act. On January 15, 2001, employer submitted an application for relief pursuant to Section 8(f), 33 U.S.C. §908(f), EX 4, which was denied by the district director based on employer's failure to offer any evidence quantifying any disability claimant may have suffered absent the alleged pre-existing condition. EX 5. On March 1, 2001, the private parties filed a Stipulation of Facts and Application for Order of Compensation with the district director. DX 3. The district director issued a Compensation Order on June 1, 2001, awarding claimant ongoing permanent partial disability benefits for a 50 percent respiratory impairment and medical benefits, 33 U.S.C. §§907, 908(c)(23), pursuant to the parties' stipulations. DX 4; 20 C.F.R §702.315. Employer's entitlement to Section 8(f) relief was not addressed in the district director's compensation order.

On December 17, 2001, employer filed form LS-18 seeking a hearing before an administrative law judge solely on the issue of its entitlement to relief pursuant to Section 8(f). DX 5. The Director, Office of Workers' Compensation Programs (the Director) moved to dismiss employer's application. 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's claim for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's denial of its request for Section 8(f) relief 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 (2d 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 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. The administrative law judge's conclusion that employer was precluded from seeking Section 8(f) relief after the district director's compensation order awarding permanent disability benefits became final 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, 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.[1] Moreover, the

[1] The administrative law judge noted that some of the cases, including *Serio*, discussing employer's obligation to raise the applicability of Section 8(f) state that employer must do so "at the first hearing on a claim" wherein permanent disability benefits are at issue. *See, e.g., Brady-Hamilton Stevedore Co. v. Director, OWCP*, 779 F.2d 512, 18 BRBS 43(CRT) (9th Cir. 1985). The administrative law judge stated that the "proceedings" before the district director in this case did not rise to this level, but that the claim for Section 8(f) relief was nonetheless barred as employer waived its right to proceed with the claim once the district director's compensation order became final.

administrative law judge rationally concluded that employer's failure to object to the district director's January 25, 2001, denial of Section 8(f) relief, until December 17, 2001, several months after the district director's Compensation Order had become final, constitutes a waiver of its right to claim Section 8(f) relief; thus, we affirm this conclusion. *See generally Verderane*, 772 F.2d 775, 17 BRBS 155(CRT); *Serio*, 32 BRBS 106.

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* Order Granting Director's Motion at 5. Thus, these conclusions are affirmed as unchallenged on appeal.

Order at 4 n.3. However, the "first hearing" requirement does not in all cases refer to a formal hearing, as some claims for benefits are, as here, resolved at the district director level. In *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997), the Fourth Circuit observed that the case law prior to the enactment of Section 8(f)(3), 33 U.S.C. §908(f)(3), in 1984 required that the claim for Special Fund relief be raised "at the first available opportunity, generally no later than the initial hearing before the ALJ." *Id.*, 126 F.3d at 266, 31 BRBS at 126(CRT). On the facts of this case, employer was obligated to take affirmative action to maintain its claim for Section 8(f) relief while the case was before the district director, as the district director is empowered to issue compensation orders when the parties are in agreement. 20 C.F.R. §702.315.

Accordingly, the administrative law judge's Order Granting Director's Motion to Dismiss Employer's Application for Section 8(f) Relief is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge