SAMUEL B. TUCKER, JR.	)	BRB No. 05-0451
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THAMES VALLEY STEEL	)	DATE ISSUED: 02/21/2006
	)	
and	)	
	)	
THE HARTFORD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
SAMUEL B. TUCKER, JR.	)	BRB No. 05-0727
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
THAMES VALLEY STEEL	)	
	)	
and	)	
	)	
THE HARTFORD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Denying Motion for Order of Forfeiture and Denying Motion for Order of Suspension of Benefits of Daniel F. Sutton, Administrative Law Judge and the Denial of a Default Order of David Groeneveld, District Director, United States Department of Labor.

Samuel B. Tucker, Jr., Waterford, Connecticut, *pro se*.

Marie E. Gallo-Hall and David A. Kelly (Montstream & May, LLP), Glastonbury, Connecticut, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Motion for Order of Forfeiture and Denying Motion for Order of Suspension of Benefits of Administrative Law Judge Daniel F. Sutton, and claimant, without the assistance of counsel, appeals the Denial of a Default Order of District Director David Groeneveld (2004-LHC-022197) 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).[1] 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). In an appeal by a claimant without representation by counsel, we will review the determinations of the district director to determine if they are arbitrary, capricious, an abuse of discretion or not in accordance with law. *See, e.g., Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

Claimant worked as a welder/ironworker through the union hall for a number of employers in the 1960's and 1970's. Claimant was diagnosed with restrictive lung disease and asbestos-related pleural disease with scarring on the lower lobe lining. Claimant filed claims for disability and medical benefits on May 18, 1993, and in March 2000. Formal hearings were conducted in this case on March 9, 2001, and September 26, 2001, and the record was closed on May 15, 2003. On September 30, 2003, the administrative law judge issued a Decision and Order Awarding Benefits and Denying Special Fund Relief. In this initial Decision and Order, the administrative law judge found that Thames Valley Steel is the responsible employer, that claimant was not a voluntary retiree, and that claimant is entitled to continuing permanent total disability benefits from May 21, 1985, and medical benefits for his asbestos-related interstitial lung disease. Employer appealed this award to the Board.

While employer's appeal was pending, claimant wrote a letter to the district director asking whether he was required to submit to a medical examination on November 26, 2003, which employer had scheduled for him. Claimant also asked whether he was required to fill out a form LS-200, statement of earnings, which employer had sent him. The district director conducted an informal telephone conference regarding

[1] By Order dated July 15, 2005, the Board consolidated the appeals for decision.

claimant's letter, in which claimant and employer participated. Claimant thereafter did not attend the scheduled examination or fill out the form LS-200 provided by employer.

On December 22, 2004, while the appeal of the administrative law judge's award of benefits was pending before the Board, the administrative law judge held a hearing on motions employer had filed to suspend or terminate claimant's benefits for failing to attend the medical examination which it had scheduled for claimant, and for claimant's failure to complete the form LS-200, statement of earnings.

On December 28, 2004, the Board issued a Decision and Order reversing the administrative law judge's finding that claimant was an involuntary retiree, vacating the award of permanent total disability benefits commencing May 21, 1985, and remanding the case for consideration of the onset of claimant's disability and the amount of benefits to which he is entitled. The Board, *inter alia*, affirmed the administrative law judge's findings on the employer responsible for the payment of benefits due claimant, and the denial of Special Fund relief. *Tucker v. Thames Valley Steel*, BRB No. 04-0316 (Dec. 28, 2004) (unpublished).[2]

On February 9, 2005, the administrative law judge issued a Decision and Order Denying Motion for Order of Forfeiture and Denying Motion for Order of Suspension of Benefits. In this decision, the administrative law judge found that the forfeiture provision of Section 8(j) of the Act, 33 U.S.C. §908(j), is not applicable, and that claimant's refusal to submit to a medical examination was both reasonable and justified, and did not warrant a suspension of benefits pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4). Accordingly, the administrative law judge denied both of employer's motions.

On March 11, 2005, claimant wrote to the district director asking him to issue a default order on the ground that employer was in default of its compensation payments. In an April 5, 2005 letter, the district director denied this request, as the Board had vacated the award of benefits.

On appeal, employer contends that the administrative law judge erred in denying its Motion for Forfeiture and Motion for Order of Suspension of Benefits. BRB No. 05-0451. Claimant, representing himself, appeals the district director's denial of a default order. BRB No. 05-0727. Employer urges affirmance of the district director's action.

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[2] The Board's decision was appealed to the United States Court of Appeals for the Second Circuit, which dismissed the case on July 26, 2005, as the appeals were not from a final Board order. *Tucker v. Thames Valley Steel*, Nos. 05-0345, 05-624 (2d Cir. July 26, 2005). The mandate was issued on November 23, 2005, and the Board received the case record back from the court on January 31, 2006.

Employer initially avers that the administrative law judge erred in denying its Motion for Forfeiture. Specifically, employer asserts that claimant violated a mandatory duty under the Act when he did not complete an LS-200 statement of earnings form sent to him by employer, and return it within 30 days of receipt, as required under the Act.

Employer first requested in October 2003, after the administrative law judge issued his Decision and Order awarding permanent total disability, that claimant submit earnings reports back to 1984. In denying the forfeiture motion, the administrative law judge found that employer was improperly using Section 8(j) of the Act in an attempt to remedy its failure to use discovery tools to obtain wage information, even though the record had been held open until May 15, 2003. Moreover, the administrative law judge reasoned that even if employer's request for earnings could be viewed as falling within the scope of Section 8(j), employer's October 2003 request fails, as employer was in default at the time it made the request because it was refusing to make compensation payments to claimant pursuant to the administrative law judge's decision.

Section 8(j) of the Act permits an employer to request that a disabled employee report his post-injury earnings. Once a valid request is made, the claimant must complete and return the form within 30 days of his receipt whether or not he has any post-injury earnings. The claimant's benefits are subject to forfeiture if earnings are knowingly and willfully omitted or understated. 33 U.S.C. §908(j);[3] *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994)(decision on recon.); 20 C.F.R. §§702.285-702.286. Section 8(j) of the Act is intended to operate as an informal tool for monitoring a disabled employee's earnings from employment or self-employment. *Cheetham v. Bath Iron Works Corp.*, 38 BRBS 80 (2004); *see also Briskie v. Weeks Marine, Inc.*, 38 BRBS 61

[3] Section 8(j)(1), (2), 33 U.S.C. §908(j)(1)–(2), of the Act provides:

> (1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.
>
> (2) An employee who-
>
> (A) fails to report the employee's earnings under paragraph (1) when requested, or
>
> (B) knowingly and willfully omits or understates any part of such earnings,
>
> and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

(2004), *aff'd mem.*, No. 04-5426, 2006 WL 140580 (2d Cir. Jan. 18, 2006); *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon en banc*, 31 BRBS 109 (1997).

The Board's decision in *Briskie*, 38 BRBS 61, is dispositive in this case.[4] Based on the plain language of 20 C.F.R. §702.285(a),[5] the Board held in *Briskie*, that an employer or the Special Fund must be paying the claimant compensation, either voluntarily or by virtue of an award, in order for the claimant to be considered "disabled" under Section 8(j), and for the employer to require the claimant to submit an earnings report pursuant to that section. If the employer or the Special Fund is not paying compensation, the forfeiture provision cannot be applied to a claimant who fails to respond timely or accurately to the wage information request. In this case, employer has not challenged the administrative law judge's finding that it was refusing to pay claimant compensation when it requested the wage information in October 2003. Therefore, Section 8(j) does not apply to this case, and we affirm the administrative law judge's denial of a forfeiture order. *Briskie*, 38 BRBS at 66.

Employer next challenges the administrative law judge's denial of its motion to suspend claimant's compensation pursuant to Section 7(d)(4) of the Act, based on his finding that claimant's refusal to undergo a medical examination scheduled by employer was reasonable and justified. Specifically, employer alleges that claimant's failure to attend a scheduled medical examination on November 26, 2003, with Dr. Teiger, arranged by employer and for which employer provided transportation, mandates that claimant's benefits should have been suspended.

Section 7(d)(4) provides that an administrative law judge may, by order, suspend the payment of compensation to an employee during any period in which he unreasonably refuses to submit to a medical examination by a physician selected by employer, unless the circumstances justified the refusal. 33 U.S.C. §907(d)(4); *see also* 20 C.F.R. §702.410(b). The Board has held that Section 7(d)(4) sets forth a dual test for determining whether benefits may be suspended as a result of a claimant's failure to

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[4] We thus need not address whether the administrative law judge properly held that Section 8(j) was not applicable due to the timing of employer's request for wage information.

[5] Section 702.285(a) states, in pertinent part, that:

> an employer, carrier or the Director (for those cases being paid from the Special Fund) may require an employee to <u>whom it is paying compensation</u> to submit a report on earnings from employment or self-employment. . . .

20 C.F.R. §702.285(a)(emphasis added).

undergo an examination. *Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995). Initially, the burden of proof is on the employer to establish that claimant's refusal to undergo a medical examination is unreasonable; if carried, the burden shifts to claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing narrowly on the individual claimant. *See Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979)(Smith, S., dissenting).

Before the administrative law judge, claimant alleged that at the time of the scheduled examination, he had an appointment with another doctor to evaluate his liver condition. Claimant also testified that he did not believe that he could be required to attend the examination with Dr. Teiger because employer was in default of its compensation payments at the time it requested the appointment. *See* December 22, 2004 Tr. at 14-15. Lastly, claimant stated that he requested a ruling from the district director as to whether he had to appear for the examination when employer was in default, and that the district director decided during a telephone conference call that claimant did not have to attend the examination. Tr. at 27. In contrast to claimant's recollection of this conference call, employer contended that the district director refused to rule on whether claimant had to submit to an examination in view of the fact that employer was in default at the time. Decision and Order Denying Motion for Order of Forfeiture and Denying Motion for Order of Suspension of Benefits at 3-4.

The administrative law judge excused claimant's failure to attend the scheduled November 26, 2003, examination, and he consequently denied employer's motion for suspension of compensation. The administrative law judge found that claimant's refusal to undergo an evaluation by Dr. Teiger was reasonable. Specifically, the administrative law judge found that as employer was in default of the compensation order and the district director had refused to rule on employer's motion, it was objectively reasonable for claimant, who was not represented by counsel at the time, to believe that he was under no obligation to attend the examination with Dr. Teiger. Alternatively, the administrative law judge found that even assuming that employer had established that claimant's actions were objectively unreasonable, claimant's failure to appear for the examination was subjectively reasonable and justified under the circumstances presented in this case since claimant was not represented by counsel, it was reasonable for him to believe that the district director had excused his attendance at the examination, and he had another appointment with a doctor for his liver condition about which he was very worried. We hold that employer on appeal has not established that the administrative law judge abused his discretion by finding that claimant's failure to appear at the November 26, 2003 examination was reasonable and justified under the specific circumstances of this case, and we accordingly affirm the administrative law judge's decision to deny employer's motion for suspension. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991),

aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

Claimant, without the assistance of counsel, appeals the district director's April 5, 2005, Denial of a Default Order. BRB No. 05-727. On March 11, 2005, claimant sent a letter to the district director inquiring as to his entitlement to a default order. In a letter dated April 5, 2005, the district director informed claimant that the Board had previously vacated the administrative law judge's award of permanent total disability benefits to claimant and remanded the case for reconsideration of the amount of benefits due claimant, and that the administrative law judge's February 2005 Decision and Order did not address these issues concerning claimant's entitlement to benefits. Thus, the district director declined to issue the default order sought by claimant.

We affirm the district director's denial of claimant's request to issue a default order. As the district director accurately set forth in his letter to claimant, the Board vacated the administrative law judge's award of benefits to claimant and remanded the case for reconsideration. The administrative law judge's February 2005 decision did not address the merits of the award or the issues on remand but held only that any benefits ultimately due are not subject to forfeiture or suspension. Moreover, as the case has been pending at the Court of Appeals, *see* n.2, *supra,* the administrative law judge has not addressed the issues on which the case had been remanded. Accordingly, as no enforceable order awarding compensation existed at the time of the district director's letter to claimant, *see generally Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1994), we hold that the district director properly declined to issue the default order sought by claimant.

Accordingly, the administrative law judge's Decision and Order Denying Motion for Order of Forfeiture and Denying Motion for Order of Suspension of Benefits and the district director's Denial of a Default Order are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge