BRB No. 91-350

MARGARET N. SADOSKY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	DATE ISSUED:_____
GENERAL DYNAMICS CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for employer.

Carol B. Feinberg (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (89-LHC-3238) of Administrative Law Judge David W. DiNardi awarding benefits 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

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant began working as a painter/cleaner at employer's Electric Boat Division in 1980. On two occasions in February 1982, she hurt her lower back, and due to the pain from her injuries, claimant could no longer work after April 1, 1982. Decision and Order at 3-4. Employer voluntarily paid compensation from April 1, 1982 through September 24, 1986 and from November 17, 1986 through November 12, 1989. Additionally, employer has made payments toward the compensation due from September 25, 1986 through November 16, 1986. Decision and Order at 3.

The district director[1] held an informal conference on June 7, 1989, wherein employer raised the applicability of Section 8(f) relief. Director's Opposition to employer's Request for Section 8(f) Relief Affidavit and Motion to Dismiss that Request (Director's Opposition); 33 U.S.C. §908(f). Employer was afforded 30 days to submit a Section 8(f) application, and it did so in a timely manner. *Id.* On October 27, 1989, the district director found the application to be insufficient as there was "no medical report establishing that claimant's permanent disability is not due solely to asbestos exposure after claimant's asbestos exposure after claimant's asbestosis became manifest and that claimant's disability is materially and substantially greater than that which solely resulted after claimant's asbestosis was manifest. *Id*. The district director informed employer it had until November 17, 1989, to correct the deficiencies and to submit a new application. Employer did not submit a new application.

The case was referred to the Office of Administrative Law Judges on July 28, 1989, and a hearing was held on September 13, 1990. The sole issue in dispute was the Director's opposition to employer's request for Section 8(f) relief. Tr. at 6. With regard to the Section 8(f) issue, the district director noted that Section 8(f) was raised before him but that employer's request for Section 8(f) relief is barred under Section 8(f)(3) because employer failed to submit a complete application. ALJ Ex. 2; 33 U.S.C. §908(f)(3) (1988). Although the Director opposed the application, raising the Section 8(f)(3) bar in a brief to the administrative law judge, he did not appear at the hearing. Citing *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), the administrative law judge found that he has the authority to consider the applicability of Section 8(f)(3) notwithstanding the district director's opinion that the bar applies. He concluded, without reviewing the original application, that employer complied with Section 8(f)(3) because it timely raised the issue of Section 8(f) before the district director and because it submitted a statement and the grounds for Section 8(f) relief. Decision and Order at 23. Thus, the administrative law judge determined that employer is entitled to have its Section 8(f) application considered on the merits. Decision and Order at 22-23. The administrative law judge then concluded that each element of Section 8(f) is satisfied and that employer is entitled to Section 8(f) relief. Decision and Order at 23-24. The Director appeals the decision, arguing that employer's claim for Section 8(f) relief is barred by Section 8(f)(3). Employer

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute. The term "district director" shall be used in this decision except where the statute is quoted.

responds, urging affirmance of the administrative law judge's Decision and Order.

The Director contends the administrative law judge erred in denying the Director's motion to dismiss employer's application for Section 8(f) relief because it failed to satisfy the requirements of Section 8(f)(3) of the Act and Section 702.321 of the regulations.[2] 33 U.S.C. §908(f)(3) (1988); 20 C.F.R. §702.321. The Director also argues that the administrative law judge's finding that employer satisfied the requirements of Section 8(f)(3) and the regulations is not supported by substantial evidence because the administrative law judge did not review the original application as employer failed to submit the application for Section 8(f) relief into evidence. In response, employer argues that it needed only to file a request for Section 8(f) relief to satisfy the statutory requirements and that it did so.

Section 8(f)(3) of the Act provides:

> Any request, filed after September 28 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3) (1988). Section 702.321 of the regulations, which is used in implementing the statute, requires employer to submit a "fully documented application" and defines the term "fully documented." 20 C.F.R. §702.321(a). Further, it provides that "failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the special fund" unless such failure is excused because employer could not have reasonably anticipated the liability of the special fund prior to the district director's consideration of the claim. 20 C.F.R. §702.321(b)(3). Where the Director has properly raised the Section 8(f)(3) defense in proceedings before the administrative law judge, the administrative law judge may not consider the merits of employer's Section 8(f) application without first fully considering whether the application is sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulations. *Fullerton v. General Dynamics Corp.*, 26 BRBS 133, 138 (1992); *Tennant v. General Dynamics Corp.*, 26 BRBS 103, 108 (1992); *see also Cajun Tubing Testors v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT) (5th Cir. 1992), *aff'g* 24 BRBS 248 (1991); *Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991), *aff'g Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991); 20 C.F.R. §702.321(a), (b), (c). The Section 8(f)(3) bar is an affirmative defense which must be raised and pleaded by the Director. *See Tennant*, 26 BRBS at 107, 109; *Marko v. Morris Boney*

[2]The Director does not present any argument with respect to the administrative law judge's findings concerning the merits of Section 8(f); the Director challenges only the administrative law judge's determination to reach the merits of employer's Section 8(f) request.

Co., 23 BRBS 353 (1990); 20 C.F.R. §702.321(b)(3).

For the reasons set forth in *Tennant*, 26 BRBS at 103, we hold that the administrative law judge erred in proceeding to consider the merits of employer's request for Section 8(f) relief without first considering whether employer's application for Section 8(f) relief was sufficiently documented pursuant to the applicable regulations.[3] We note that, inasmuch as the application was not included in the record, the administrative law judge had an inadequate basis for denying the Director's motion to dismiss. Since the application is not in the record before us, we will not address any issues relating to the sufficiency of the application or whether the district director properly found it inadequate. The administrative law judge must make his own conclusions on remand based on a *de novo* review of the application and other relevant evidence. *Compare Bath Iron Works*, 950 F.2d at 60, 25 BRBS at 64 (CRT), *with Cajun Tubing Testors*, 951 F.2d at 75-76, 25 BRBS at 111-112 (CRT). Because the Section 8(f) bar is an affirmative defense, the burden is on the Director to submit employer's application for Section 8(f) relief into evidence. *Tennant*, 26 BRBS at 109. If the administrative law judge finds that the Section 8(f)(3) absolute bar does not apply, he then may consider the merits of employer's request for relief pursuant to Section 8(f). If he finds that the bar applies, the request for Section 8(f) relief must be denied. Therefore, we vacate the administrative law judge's denial of the Director's motion to dismiss and his award of Section 8(f) relief to employer, and remand the case for reconsideration of whether employer's Section 8(f) application was sufficient to meet the requirements of Section 8(f)(3) of the Act and Section 702.321 of the regulations. On remand, the administrative law judge must reopen the record for submission of the Section 8(f) application originally filed by employer with the district director and any other relevant evidence.

[3]We note that in this case the Director concedes employer's entitlement to have the issue of the sufficiency of its Section 8(f) application decided by the administrative law judge. This aligns the case more closely with *Tennant* than with *Fullerton*. *See Fullerton*, 26 BRBS at 138 n. 5.

Accordingly, that part of the Decision and Order of the administrative law judge denying the Director's motion to dismiss and awarding employer Section 8(f) relief is vacated, and the case is remanded for further consideration in accordance with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge