BRB No. 99-1048

WILLIAM WALENDA	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NORTHWEST MARINE, INCORPORATED	)	DATE ISSUED: 7/7/2000
	)	
and	)	
	)	
LEGION INSURANCE, COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Approving Stipulations, Awarding Benefits and Attorney Fees, and Granting Employer's Petition for Section 8(f) Relief of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Dennis R. VavRosky (VavRosky, MacColl, Olson & Pfeifer, P.C.), Portland, Oregon, for employer/carrier.

Kristin M. Dadey (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, 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 NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Approving Stipulations, Awarding Benefits and Attorney Fees, and Granting Employer's Petition for Section 8(f) Relief (97-LHC-1958) of Administrative Law Judge Samuel J. Smith 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In January 1991, claimant sought treatment for bilateral knee pain. His symptoms were consistent with the prior removal of the medial meniscus from each knee 20 to 25 years earlier. In September 1991, claimant was laid off by employer from his usual employment as a pipefitter. Thereafter, employer terminated its operations at the facility where claimant had been employed. Pursuant to the recommendation of his treating physician, Dr. Baldwin, claimant underwent proximal tibial osteotomies on the left knee on March 13, 1992, and on the right knee on September 18, 1992. On May 3, 1993, Dr. Baldwin found claimant's condition medically stationary and he imposed specific work restrictions, which he characterized as limiting claimant to sedentary or very light work. On January 11, 1994, employer submitted to the district director Form LS-208, Payment of Compensation Without an Award, showing that it had instituted compensation for permanent partial disability on May 1, 1993. Employer continued these payments for 156 2/7 weeks, or through April 28, 1996. Dr. Baldwin performed bilateral arthroscopies and staple removal on March 18, 1994. He opined that claimant's condition was medically stationary on May 19, 1994, and that claimant remained subject to the May 1993 work restrictions. On January 27, 1997, Dr. Baldwin recommended a total right knee replacement, which he performed on March 4, 1997. He recommended a total left knee replacement on June 5, 1997, which he subsequently performed a month or two later. On June 6, 1997, the district director referred the knee injury claims to the Office of Administrative Law Judges (OALJ). At no time while the knee injury claims were before the district director did employer present an application for relief under Section 8(f) of the Act, 33 U.S.C. §908(f). On February 9, 1998, Dr. Baldwin rated each knee as having a 75 percent impairment, and he opined that claimant could perform sedentary work.

Prior to the formal hearing, the administrative law judge convened a

mediation/settlement conference, and the Director, participating by telephone, raised the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3). In his Decision and Order, the administrative law judge accepted the private parties' stipulations as to all issues between them, which, in the absence of contradictory evidence or argument, he found supported by substantial evidence and binding on the Director. The administrative law judge next addressed the absolute defense of Section 8(f)(3). He found that employer could not have anticipated that the permanency of claimant's bilateral knee condition would be at issue until after referral of the knee claims to the OALJ. Specifically, the administrative law judge found that permanency was not established until Dr. Baldwin rated claimant's bilateral impairment at 75 percent on February 9, 1998. The administrative law judge found that Dr. Baldwin's prior opinions that claimant's knee condition had become medically stationary were in error given the subsequent bilateral knee replacements in 1997. The administrative law judge next found that the 75 percent impairment of each knee is due, in part, to a manifest pre-existing permanent partial knee disability, which results in a materially and substantially greater impairment of each knee, and he awarded employer relief from continuing compensation liability pursuant to Section 8(f).

The administrative law judge ordered employer to pay 208 weeks of compensation for a 75 percent impairment of each knee and the Special Fund was ordered to pay in a lump sum the remaining 224 weeks of compensation (112 x 2).[1] In an Amended Decision and Order, Chief Administrative Law Judge Vittone, acting for the retired Judge Smith, granted employer's motion to amend. He modified Judge Smith's decision to provide that the claim for the bilateral knee injuries is a single claim, and that, therefore, employer is liable for only one period of 104 weeks. Moreover, pursuant to claimant's prior request to Judge Smith, he ordered the Special Fund to pay claimant $150 per week for the remaining 328 weeks rather than in a lump sum.

[1]Employer was also ordered to pay $6,542.53 for a 10.6 percent binaural hearing loss. Claims for an alleged back injury and for Raynaud's syndrome of the hands remained controverted.

On appeal, the Director contends that Judge Smith (the administrative law judge) erred in finding that the absolute defense of Section 8(f)(3) does not bar employer's claim for Section 8(f) relief. In the alternative, the Director argues that the administrative law judge erred in awarding employer Section 8(f) relief as claimant's pre-existing disability did not contribute to a materially and substantially greater disability than that which would have resulted from the subsequent work injury to both knees alone. The Director further contends that the administrative law judge did not determine the percentage of impairment due to the pre-existing and subsequent disabilities, as employer is liable for the greater of 104 weeks or the impairment attributable to the subsequent injury, pursuant to Section 8(f)(1). Employer responds, urging affirmance.[2]

[2]In response, employer contends, *inter alia*, that its motion to amend, filed while the case was pending before the administrative law judge, renders premature the filing of the Director's appeal with the Board, thereby requiring dismissal of the appeal by the Board for lack of jurisdiction. 20 C.F.R. §802.206(f). Moreover, employer contends that the Director did not file a new notice of appeal after issuance of the Amended Decision and Order. *See* 20 C.F.R. §§802.205(c), 802.206(f). Employer's contention is rejected. The regulation provides for tolling of the time for appeal upon the filing of a motion for reconsideration. 20 C.F.R. §802.206(a). Employer filed a motion to modify, which the administrative law judge properly construed as requesting an amendment to the initial decision rather than as requesting reconsideration. Accordingly, the filing of employer's motion to modify did not toll the statute of limitations for the filing of a timely appeal to the Board. *See Graham-Stevenson v. Frigitemp Marine Division*, 13 BRBS 558 (1981).

Section 8(f)(3) requires an employer to present a request for Section 8(f) relief to the district director prior to his consideration of the claim; failure to do so bars the payment of benefits by the Special Fund, unless the employer demonstrates it could not have reasonably anticipated that the Special Fund's liability would be at issue while the case was before the district director.[3] 33 U.S.C. §908(f)(3). The regulation implementing this provision, 20 C.F.R. §702.321, provides that an employer seeking relief under Section 8(f) must request the relief and file a fully documented application with the district director prior to referral of the claim for adjudication. Section 702.321(b)(3) states that an application need not be filed with the district director where claimant's condition has not reached maximum medical improvement and no claim for permanent benefits is raised by the date of referral, *see Brazeau v. Tacoma Boatbuilding Co.*, 24 BRBS 128 (1990), but provides that in all other cases 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. Such a failure may be excused only where the employer could not have reasonably anticipated the liability of the Special Fund prior to the consideration of the claim by the district director. The regulation also states that the Section 8(f)(3) bar is an affirmative defense which must be raised and pleaded by the Director. In this case, the Director timely raised the defense before the administrative law judge. As this defense was properly raised, and it is undisputed that employer did not file a Section 8(f) application with the district director, it is employer's burden to establish that it could not have reasonably anticipated the liability of the Special Fund. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283, *modifying in pert. part on recon.* 32 BRBS 118 (1998).

We agree with the Director that the administrative law judge's finding that the absolute bar does not apply in this case cannot be affirmed, as his rationale is not supported

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[3]Section 8(f)(3) of the Act states:

> 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 (sic), shall be presented to the [district director] prior to the consideration of the claim by the [district director]. 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).

by the evidence and is not consistent with the regulation. Section 702.321(b)(1) provides that a request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known or is an issue in the case. *See Container Stevedoring v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). Section 702.321(b)(3) further states that except in those cases where claimant's condition has not reached permanency, the failure to file a fully documented application by the date established by the district director shall be an absolute defense and that failure to file a fully documented application may be excused only where employer could not have reasonably anticipated the liability of the Special Fund. *See Wiggins v. Newport New Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

In the instant case, the administrative law judge found that permanency was not established until February 9, 1998, when Dr. Baldwin opined that claimant has a 75 percent bilateral knee impairment. The administrative law judge determined that Dr. Baldwin's prior opinions that claimant's knee condition had reached permanency were in error given claimant's subsequent bilateral total knee replacements. We reject this interpretation of permanency, as it is premised solely on the date Dr. Baldwin gave claimant an impairment rating, to the exclusion of other evidence of permanency. Dr. Baldwin's May 3, 1993, and May 19, 1994, reports state that claimant's knees are medically stationary and that he could perform sedentary to light duty based on specific work restrictions. *See Container Stevedoring*, 935 F.2d at 1544, 24 BRBS at 213 (CRT); *see also McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Moreover, the administrative law judge erred by rejecting this evidence of permanency on the basis that claimant subsequently underwent bilateral knee replacements, as the worsening of claimant's knee condition is irrelevant to the pertinent issue of whether employer could have reasonably anticipated the potential liability of the Special Fund based on the permanency of claimant's condition, as permanency may be established by the longstanding nature of claimant's condition. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *see also Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986). Furthermore, the parties' stipulation that employer paid claimant permanent partial disability benefits prior to the claim's referral to the OALJ also is relevant to employer's awareness of the permanency of claimant's condition.

We, therefore, vacate the administrative law judge's finding that Section 8(f)(3) does not bar employer's request for Section 8(f) relief, and we remand this case for the administrative law judge to determine whether employer established that it could not reasonably have anticipated the liability of the Special Fund while the case was pending before the district director. In this regard, the permanency of claimant's condition is not the sole criterion for determining whether employer reasonably could have anticipated the Special Fund's liability; the administrative law judge also should address when employer reasonably knew the case might meet the legal requirements for obtaining Section 8(f) relief, when evidence relevant to these requirements was available, and any other facts having an

impact on employer ability to raise a Section 8(f) claim. *See, e.g., Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991); *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990). In this regard, employer responds that it could not have reasonably anticipated before transfer of the claim to the OALJ that the schedule award for claimant's knee impairment would exceed 104 weeks and thereby render the Special Fund potentially liable pursuant to Section 8(f), which, in cases of permanent partial disability, limits employer's liability to the greater of 104 weeks or the number of weeks attributable under the schedule to the subsequent injury. *See* 33 U.S.C. §908(f)(1). Employer asserts that it could not have reasonably anticipated that the extent of claimant's knee impairment would render the Special Fund potentially liable until Dr. Baldwin opined on February 9, 1998, after transfer of the knee claim to the OALJ, that claimant has a 75 percent bilateral knee impairment. Juxtaposed to employer's assertion, however, is the parties' stipulation that employer paid claimant benefits for permanent partial disability for 156 2/7 weeks between May 1, 1993, through April 28, 1996, which is prior to the referral of the knee claim to the OALJ on June 6, 1997.[4] Decision and Order at 2, 8. Whether employer could have reasonably anticipated that the Special Fund's liability would be at issue prior to referral of the claim to the OALJ is a factual determination that is appropriately assessed by the administrative law judge. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65 (CRT)(5th Cir. 1999); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT) (4th Cir. 1998). Accordingly, on remand, the administrative law judge should evaluate the relevant evidence regarding whether the permanency of claimant's condition was known or at issue, or if employer could reasonably anticipate that the extent of claimant's bilateral knee impairment might meet the legal requirements for obtaining Section 8(f) relief, while the case was pending before the district director. *Farrell*, 32 BRBS at 283.

While the case is being remanded for the administrative law judge to reconsider the applicability of the absolute defense, for the purpose of judicial economy we will address the Director's arguments regarding the administrative law judge's award of Section 8(f) relief on the merits. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury but "is materially and substantially

[4]We also note that, contrary to the administrative law judge's finding that claimant underwent both total knee replacements after referral of the knee claim to the OALJ, claimant's right knee replacement was performed on March 4, 1997, EX 59-61, approximately three months prior to referral of the claim to the OALJ.

greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204 (CRT)(9th Cir. 2000); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Employer must present medical or other evidence to establish that claimant's current disability is materially and substantially greater due to the contribution of the pre-existing disability. *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

In this case, the Director does not contest the administrative law judge's finding that claimant had a manifest permanent partial disability pre-existing his work injury, but challenges the conclusion that claimant's current disability is not due solely to the subsequent injury and is materially and substantially greater from the contribution of the pre-existing disability to claimant's current permanent partial disability.[5]

In his decision, the administrative law judge credited medical evidence that claimant has long-standing and ongoing knee problems since 1970 and Dr. Baldwin's January 15, and May 18, 1992, reports in which he opined that claimant has post-traumatic osteoarthritis in the medial compartment of both knees and that claimant's need for bilateral proximal tibial osteotomies in 1992 is directly related to the aggravation of claimant's pre-existing bilateral knee condition. Decision and Order at 17-18. From this evidence, the administrative law judge determined that "the preexisting disability contributed to Claimant's overall work-related disability, resulting in a materially and substantially greater impairment." Decision and Order at 18. In order to establish the contribution element in cases of permanent partial disability, employer must introduce substantial evidence that claimant's ultimate permanent partial disability, in this case a 75 percent bilateral knee impairment, is not due solely to the work injury and is materially and substantially greater due to claimant's pre-existing disability. *Quan*, 203 F.3d at 664, 33 BRBS at 204 (CRT)(9th Cir. 2000); *Director, OWCP, v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146 (CRT)(5th Cir. 1997). In the instant case, the administrative law judge did not review the relevant evidence pursuant to the applicable law. Specifically, while the credited evidence may establish that claimant's current disability is not due solely to the work injury, it alone does not establish that claimant's current permanent partial disability is materially and substantially greater than that

[5]Employer responds, *inter alia*, that the Director failed to raise this issue before the administrative law judge. On remand, the administrative law judge should, if necessary, review the relevant evidence of record and address employer's assertion.

which would have resulted from the subsequent injury alone. On remand, the administrative law judge must determine if claimant's pre-existing disability materially and substantially contributed to claimant's current impairment.

Moreover, we agree with the Director that, should the administrative law judge on remand find employer entitled to Section 8(f) relief, he must determine the percentage of impairment of claimant's pre-existing disability in order to derive the respective compensation liability of employer and the Special Fund. As stated previously, the Act provides that an employer is liable for 104 weeks or the number of weeks of benefits due pursuant to the schedule for the subsequent injury, whichever is *greater*. 33 U.S.C. §908(f)(1); *Strachan Shipping Co. v. Nash*, 751 F.2d 1460, 17 BRBS 29(CRT) (1985), *modified on other grounds on recon. en banc*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). An employer is thus liable for the entire amount due as a result of the subsequent work injury and the Special Fund is liable for any remaining amounts which are related to the pre-existing disability. *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); *Padilla v. San Pedro Boat Works*, BRBS , BRB No. 99-862 (May 17, 2000); *Davenport*, 18 BRBS at 197. Accordingly, on remand, the percentage of impairment of claimant's pre-existing disability must be determined in order to apportion liability under Section 8(f) between employer and the Special Fund.

Accordingly, the award of Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with the decision. In all other respects, Judge Smith's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge