

WILLIAM L. WOODMANSEE	)	BRB No. 03-0614
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: <u>May 7, 2004</u>
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
	)	
	)	
ROBERT RIDEOUT	)	BRB No. 03-0657
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decisions and Orders Granting Motion to Dismiss of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decisions and Orders Granting Motion to Dismiss (2003-LHC-1285, 2003-LHC-1202) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on claims 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). We consolidate these cases for decision. 20 C.F.R. §802.104(a).

Both claimants filed claims under the Act seeking benefits for an asbestos-related injury, which they alleged occurred due to their exposure to asbestos with employer. In each case, employer filed an application for Section 8(f) relief, 33 U.S.C. §908(f), with the district director. *See* 33 U.S.C. §908(f)(3). The district director denied the application in *Woodmansee* on September 21, 2001, and in *Rideout* on May 3, 2000, on the ground that employer failed to satisfy the contribution element as articulated in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4<sup>th</sup> Cir. 1998). Subsequently, employer and claimants, who were represented by counsel, entered into stipulations of fact and requested that the district director issue a compensation order awarding each claimant permanent partial disability benefits. The district director did so on October 17, 2000, in the *Rideout* case, and on December 13, 2001, in the *Woodmansee* case.<sup>1</sup> Neither the stipulations submitted to the district director nor the district director's orders mentioned Section 8(f). In early 2003, employer filed with the district director LS-18 pre-hearing statements and asked

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<sup>1</sup> Claimant Woodmansee was awarded permanent partial disability benefits for an 80 percent pulmonary impairment and Claimant Rideout was awarded permanent partial disability benefits for a 30 percent pulmonary impairment. 33 U.S.C. §§902(10), 908(c)(23).

that the cases be referred to the Office of Administrative Law Judges (OALJ) for a hearing on the merits of its entitlement to Section 8(f) relief. The district director referred the cases to the OALJ.

Both cases were assigned to Judge Sarno. The Director filed a motion to dismiss each case on the ground that employer had allowed a compensation order to become final without the adjudication of the Section 8(f) issue, and that the bifurcation of the Section 8(f) issue from the merits of the claims is precluded under case precedent ranging from *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979) to *Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106 (1998). The administrative law judge granted the motions to dismiss, and therefore did not address the merits of employer's entitlement to Section 8(f) relief.

On appeal, employer challenges the administrative law judge's granting of the Director's motions to dismiss, averring that it did not waive its right to seek Section 8(f) relief before the administrative law judge. The Director responds in support of the administrative law judge's decisions.

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) (4<sup>th</sup> Cir. 1997); *American Bridge Div., U.S. Steel Corp. v. Director, OWCP*, 679 F.2d 81, 14 BRBS 923 (5<sup>th</sup> 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<sup>d</sup> Cir. 1981); *Wilson v. Old Dominion Stevedoring Corp.*, 10 BRBS 943 (1979); *Egger*, 9 BRBS 897. 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) (11<sup>th</sup> Cir. 1985); *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1<sup>st</sup> Cir. 1982).

In *Egger*, 9 BRBS 897, death benefits were awarded to the claimant in a 1975 decision. Employer subsequently sought modification under Section 22 in order to seek Section 8(f) relief. The administrative law judge denied modification on the ground that employer was trying to litigate an issue it had raised, but had withdrawn, at the initial hearing. The employer appealed, contending that it should be permitted to use Section 22 to seek Section 8(f) relief because use of modification procedures would not in any way

affect the claimant's entitlement. The Director responded that employer waived its Section 8(f) argument at the initial hearing and should not be permitted to raise Section 8(f) via modification proceedings unless it also shows a mistake in fact in the initial decision or a change in claimant's condition.

The Board held that, on the facts of that case, the interests of justice required that the case be remanded for consideration of the Section 8(f) application, because it was clear at the time of the initial 1975 hearing that employer reasonably believed it could bifurcate the issues of the compensability of claimant's claim and the claim for Section 8(f) relief. The Board then stated that, "It is our opinion that it is improper to bifurcate hearings on issues that can be litigated at one hearing. In any case in which the application of Section 8(f) is an issue, we hold that hereafter the issue must be raised and litigated at the first hearing of the case." *Egger*, 9 BRBS at 899.

In *Serio*, 32 BRBS 106, the private parties stipulated before the administrative law judge that claimant, a retiree, was entitled to permanent partial disability benefits for a 25 percent pulmonary impairment. 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. The Board observed that *Egger* had been the rule for 15 years at the time of formal hearing in *Serio*, and employer therefore could not reasonably believe it could abandon its Section 8(f) claim at the first hearing and pursue it later in separate proceedings. *Serio*, 32 BRBS at 108.

We reject employer's contention that the administrative law judge erred in dismissing employer's requests for Section 8(f) relief. The administrative law judge's conclusion, on the facts of these cases, that employer was precluded from seeking Section 8(f) relief after it failed to fully "litigate" its Section 8(f) claims prior to the entry of the orders 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, the administrative law judge properly found that, pursuant to *Egger*, the issue of employer's entitlement to Section 8(f) relief must be litigated in the same proceeding wherein claimant's entitlement to permanent disability benefits is litigated, even if that proceeding is at the district director level. *See generally American Bridge Div.*, 679 F.2d at 83, 14 BRBS at 926; *Serio*, 32 BRBS at 108; *Egger*, 9 BRBS at 899; *Woodmansee* Decision and Order at 4; *Rideout* Decision and Order at 4. Claimants' permanent disability claims were "litigated" before the district director in that claimants and employer entered into stipulations of fact in lieu of offering evidence to an

administrative law judge, 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, and employer was not permitted to renew its claim for Section 8(f) relief after the administrative law judge issued his decision based on the parties' stipulations.

Moreover, the administrative law judge rationally concluded that employer's failure to object to the district director's 2000 and 2001 denials of Section 8(f) relief, until requesting a formal hearing in 2003, constitutes a waiver of its right to claim Section 8(f) relief; thus, we affirm this conclusion. *See generally Universal Maritime Corp.*, 126 F.3d 256, 31 BRBS 119(CRT); *Verderane*, 772 F.2d 775, 17 BRBS 155(CRT); *Serio*, 32 BRBS 106. 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 allowing compensation orders awarding claimants permanent disability benefits to become final without disposing of the Section 8(f) issue, thereby resulting in an impermissible attempt to bifurcate issues.

Employer contends that if the Board is to take the approach, on the facts of these cases, that employer cannot pursue Section 8(f) relief before an administrative law judge after a district director's compensation order awarding benefits to the claimant becomes final, it should do so only prospectively, as in *Egger*. Employer avers that the district director has for many years encouraged the private parties to enter into stipulations and a consent order at the district director level and then to transmit the Section 8(f) issue alone to the administrative law judge for a formal hearing at employer's request. Employer contends that if the Director is going to change his position, he should be allowed to do so only prospectively. The Director counters that there has been no change in the Director's policy on this issue, and especially not since *Serio* was issued in 1998. The Director observed that employer was a party in *Serio* and cannot credibly argue that it was unaware of the policy against bifurcation of Section 8(f) from the merits of a claim.

We decline employer's offer that we permit its claims for Section 8(f) relief in these cases to go forward and to prospectively apply the holding herein. The administrative law judge's decisions and the Board's affirmance thereof are based on well-established case law; *Egger* dates from 1979 and has been cited with approval by several United States Courts of Appeals. *See, e.g., Brady-Hamilton Stevedore Co. v. Director, OWCP*, 779 F.2d 512, 18 BRBS 43(CRT) (9<sup>th</sup> Cir. 1985); *Verderane*, 772 F.2d at 779, 17 BRBS at 157-158(CRT) (observing that the Board's opinion in *Egger* disapproved the practice of withdrawing the Section 8(f) request and then reasserting it once claimant's disability had been established); *American Bridge Div.*, 679 F.2d at 83,

14 BRBS at 926. *Serio* was decided in 1998. The policy of judicial economy dictates that all claims relating to a specific injury, including affirmative defenses such as Section 8(f), be raised and litigated at the same time, especially as the Director is not bound by stipulations into which the private parties enter without his agreement. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9<sup>th</sup> Cir. 1993); *Brady Hamilton*, 779 F.2d at 513, 18 BRBS at 44(CRT); *Brady v. J. Young & Co.*, 17 BRBS 46, *aff'd on recon.*, 18 BRBS 167 (1985). Moreover, employer has not established that the district director encourages a practice that is contrary to established law. *See American Bridge Div.*, 679 F.2d at 85, 14 BRBS at 927.

Finally, we observe that employer has not contended that “special circumstances” permit its Section 8(f) application to be considered, nor has employer sought modification of the district director’s compensation award. *Edward Minte Co.*, 803 F.2d 731, 19 BRBS 27(CRT). Thus, we affirm the administrative law judge’s granting of the Director’s motions to dismiss and the consequent denials of Section 8(f) relief.

Accordingly, the administrative law judge’s Decisions and Orders Granting Motion to Dismiss 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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REGINA C. McGRANERY  
Administrative Appeals Judge

