

BRB No. 09-0103
OWCP No. 07-171470

K.C.)
)
 Claimant-Petitioner)
)
 v.)
)
 NORTHROP GRUMMAN SHIP SYSTEMS,) DATE ISSUED: 11/21/2008
 INCORPORATED)
)
 Self-Insured)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
) ORDER
 Party-in-Interest)

Claimant has filed a Notice of Appeal and Amended Notice of Appeal of: (1) the district director's July 9, 2007 memorandum of informal conference; (2) the district director's October 15, 2007, memorandum of informal conference; (3) the district director's April 4, 2008, letter in response to claimant's motion for clarification; (4) the district director's August 25, 2008, letter in response to claimant's motion for clarification; (5) the district director's September 26, 2008, memorandum of informal conference; and (6) the April 21, 2008, letter of the Director, Office of Workers' Compensation Programs on behalf of the Secretary of Labor. This appeal is assigned the docket number BRB No. 09-0103. All correspondence pertaining to this appeal must bear this number.

Claimant has filed this appeal in an attempt to have the district director issue a recommendation favorable to claimant on the issue of the extent of his disability for purposes of the fee liability provisions of Section 28(b) of the Act, 33 U.S.C. §928(b).¹

¹ In *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006), the Board discussed the consequences of a recommendation unfavorable to claimant, which is accepted by employer, where claimant ultimately succeeds on that issue before the administrative law judge. See also *Andrepoint v. Murphy Exploration & Prod. Co.*, 41 BRBS 1 (2007)

Employer has filed a motion to dismiss claimant's appeal, contending that the memoranda of informal conference and the letters are not appealable to the Board. Employer contends claimant's only recourse is to request referral of the claim to the Office of Administrative Law Judges (OALJ) for a formal hearing.

We agree with employer that claimant's appeal must be dismissed. The regulation at 20 C.F.R. §702.316 addresses the situation where the parties do not come to an agreement at the conclusion of the informal conference. It states that the district director is to prepare a memorandum of informal conference with recommendations, and to transfer the case to the OALJ at the request of any party or on his own initiative if he believes further informal proceedings would be futile. In addition, 20 C.F.R. §702.317(c) states that the district director "shall not" transfer to the OALJ "any recommendations expressed or memoranda prepared by the district director pursuant to Sec. 702.316." Section 19(d) of the Act, 33 U.S.C. §919(d), divested the district directors of jurisdiction over issues requiring fact-finding and shifted that responsibility to administrative law judges. *Barthelemy v. J. Ray McDermott & Co.*, 537 F.2d 168, 4 BRBS 325 (5th Cir. 1976). Thus, following the conclusion of informal proceedings in which there is no agreement, the parties must seek a hearing before the administrative law judge when findings of fact are required. *Anweiler v. Avondale Shipyards, Inc.*, 21 BRBS 271 (1988) (dismissing appeal of deputy commissioner's imposition of Section 30(e) penalty, as fact-finding by administrative law judge required); *see also Durham v. Embassy Dairy*, 40 BRBS 15 (2006) (district director improperly awarded death benefits when disputed issues remained).

Pursuant to Section 21(b)(3) of the Act, "The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof." 33 U.S.C. §921(b)(3). Section 802.201(a)(1) of the regulations, 20 C.F.R. §802.201(a)(1), states, "Any party or party-in-interest adversely affected or aggrieved by a decision or order issued pursuant to one of the Acts over which the Board has appellate jurisdiction may appeal a decision or order of an administrative law judge or deputy commissioner to the Board by filing a notice of appeal." These provisions require a final action by the adjudicator in order to be appealable. *See Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000) (district director has authority to address attorney's fee for work performed before him as it is within his discretion); 20 C.F.R. §702.315. The memoranda of informal conferences are not final appealable actions; they do not purport to be a final decision or resolve matters within the authority of the district director. *See,*

(Hall, J., dissenting), *recon. denied*, 41 BRBS 43 (2007) (Hall, J., concurring), appeal pending, No. 08-60251 (5th Cir.).

e.g., Maria v. Del Monte/Southern Stevedore, 22 BRBS 132 (1989) (*en banc*), *vacating on reconsideration* 21 BRBS 16 (1988) (associate director's letter notifying claimant that the Special Fund was suspending benefits while it recouped a credit is not a final appealable order); *Anweiler*, 21 BRBS 271. Similarly, the letter of the Director on behalf of the Secretary of Labor is not appealable to the Board. Claimant's recourse is with the administrative law judge, as the issue raised by claimant concerns the extent of his disability, which requires fact-finding by an administrative law judge in order to resolve a dispute. As the district director's memoranda of informal conferences and associated correspondence are not final decisions, they are not appealable under Section 21(b)(3).

Accordingly, we grant employer's motion to dismiss claimant's appeal.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge