BRB No. 10-0324

GEORGE D'AMBROSI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APM TERMINALS, INCORPORATED	)	
	)	
and	)	
	)	
PORTS AMERICA GROUP	)	DATE ISSUED: 11/24/2010
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employers/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Approving Settlement of Future Medical Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

James P. Aleccia (Aleccia, Conner & Socha), Long Beach, California, for APM Terminals, Incorporated, Ports America Group, and Signal Mutual Indemnity Association.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Approving Settlement of Future Medical Benefits (2009-LHC-01378, 01379) of Administrative Law Judge Gerald M. Etchingham 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed a claim against APM Terminals, Incorporated (APM), for a binaural hearing loss caused by injurious exposure to excessive noise through December 2, 2007. He filed a second claim for binaural hearing loss against Ports America Group (employer) alleging injurious noise exposure through February 18, 2008. On December 16, 2009, employer and claimant sought from the administrative law judge a compensation order awarding claimant benefits, based on the parties' stipulations, for his work-related hearing loss, and granting employer's accompanying application for Section 8(f) relief, 33 U.S.C. §908(f).[1] On that same date, claimant and both employers also sought approval of their Section 8(i) settlement application, 33 U.S.C. §908(i), wherein employer agreed to pay claimant $1,500 to settle his entitlement to future medical care for his hearing loss. *See* 33 U.S.C. §907. On December 22, 2009, the Director filed a document stating he was not opposed to the administrative law judge's granting employer's request for Section 8(f) relief.

On December 30, 2009, the administrative law judge issued both a Compensation Order and a Decision and Order. The Compensation Order approved the parties' stipulations regarding claimant's entitlement to compensation for a 34.1 percent hearing loss and attorney fees, and it granted employer's request for Section 8(f) relief. This order has not been appealed. The Decision and Order approved the application for a Section 8(i) settlement of claimant's entitlement to future medical benefits. The decision summarized the parties' agreement and stated, "[T]he Agreement does not appear to be either inadequate or the result of duress. Accordingly, the proposed Agreement is hereby **APPROVED**." Decision and Order at 2 (bold-faced type in original).

[1] Employer stipulated to its liability for a 34.1 percent binaural hearing loss, based on an audiogram conducted on February 19, 2008. Employer further requested Section 8(f) relief based on a November 24, 1997 audiogram that showed a 15 percent binaural loss.

On appeal, the Director challenges the administrative law judge's approval of the parties' settlement of $1,500 for future medical benefits. Both employers respond, urging affirmance of the administrative law judge's decision. The Director filed a reply brief. Claimant has not participated in this appeal.

The Director, in his capacity as administrator of the Act, *see generally Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (*en banc*); 20 C.F.R. §802.201(a), contends that there was an insufficient basis for the administrative law judge to conclude that the settlement application conformed to the requirements of Section 702.242(b), 20 C.F.R. §702.242(b). The Director also contends that the administrative law judge erred in summarily approving claimant's settlement of his future medical benefits claim with employer for $1,500 without explaining how this dollar figure is adequate.

Where claimant seeks to terminate his compensation claim for a sum of money, the Section 8(i) settlement procedures, as delineated in the Act's implementing regulations, must be followed. *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993) (Brown, J., dissenting); 20 C.F.R. §§702.241-702.243. The implementing regulations ensure that the approving official has the information necessary to determine whether the settlement application is inadequate or procured by duress. *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991). Specifically, Section 702.242(a) states that the "settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file." 20 C.F.R. §702.242(a).

Section 702.242(b)(2) provides that the settlement application contain "[t]he reason for the settlement, and the issues which are in dispute, if any." 20 C.F.R. §702.242(b)(2). The parties' agreement stated that they settled the claim "to avoid the hazards and uncertainties of trial and costs of appeal. In this regard, the parties fully recognize that an adverse judgment could be reached if the matter proceeded to trial on all outstanding issues." Settlement Application at 2. However, review of the parties' pre-hearing statements reveal that while the extent of claimant's hearing loss and his average weekly wage were disputed,[2] employer's liability to claimant for compensation and, therefore, future medical care was not at issue prior to the hearing scheduled for

[2] In its pre-hearing statement, employer accepted liability for a 34.1 percent hearing loss based upon an average weekly wage of $1,003.44 and for future medical care, while claimant sought, via his pre-hearing statement, compensation for a 45.3 percent hearing loss based on an average weekly wage of $1,552.

December 7, 2009.[3] Accordingly, claimant's entitlement to future medical care was not, as the parties' inaccurately stated in their settlement application, subject to "the hazards and uncertainties of trial and costs of appeal." Settlement Application at 2. Thus, the parties' settlement application does not provide a valid reason for the settlement, as required by Section 702.242(b)(2).

Additionally, Section 702.242(b)(6) requires that a settlement application explain "how the settlement amount is considered adequate." 20 C.F.R. §702.242(b)(6). Where the settlement application covers medical benefits, the regulations require that it include "an itemization of the amount paid for medical expenses by year for the three years prior to the date of the application," and "an estimate of the claimant's need for future medical treatment as well as an estimate of the cost of such medical treatment." 20 C.F.R. §702.242(b)(7).[4] As the Director notes, Dr. Burns's November 24, 1997, report found a 15 percent binaural impairment and stated that claimant "needs to see ear specialist for correction." EX 7 at 37k. Employer contends that, based on claimant's deposition testimony he obtained hearing aids prior to the settlement and thus the amount agreed to is adequate. The deposition was not appended to the settlement application or included in the exhibits the parties submitted to supplement the application. Therefore, it was not considered by the administrative law judge and may not be considered by the Board in reviewing whether the application sufficiently explains why the settlement amount is adequate. *See generally Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003). Nevertheless, assuming, *arguendo*, that claimant obtained hearing aids in 2007 or 2008, their cost should have been itemized in the application, pursuant to Section 702.242(b)(7).[5] Additionally, the parties provided no information regarding the future cost of treatment and/or assistive equipment associated with claimant's work-related hearing loss. 20 C.F.R. §702.242(b)(7).

[3] The joint stipulations resolved the disputed issues. The parties agreed that claimant has a 34.1 percent hearing loss that is compensable based on an average weekly wage of $1,157.44.

[4] Section 702.242(b)(7) further states that this requirement may be waived by the adjudicator for good cause shown. This waiver did not explicitly occur in this case, nor was there any good cause discussion.

[5] Moreover, if claimant obtained hearing aids, the parties' representation that the amount paid for medical expenses for the three years prior to the date of the settlement application was "0" is inaccurate.

Furthermore, Section 702.242(b)(8), requires that the settlement application contain "information on any collateral source available for the payment of medical expenses." 20 C.F.R. §702.242(b)(8). While, as the Director suggests, it may be inferred from the settlement application that claimant's private health insurer, the ILWU-PMA Welfare Plan covered his medical costs from 2006 to 2008, the parties did not explicitly indicate that claimant's additional medical insurance will pay for his work-related hearing loss.

In sum, the settlement application does not contain sufficient information, as required by Sections 702.242(b)(2), (b)(6) – (b)(8), to support the administrative law judge's conclusion that "[t]he Agreement does not appear to be …. inadequate." *See McPherson*, 26 BRBS 71; 20 C.F.R. §§702.242(a), 702.243(f). As the administrative law judge summarily found the settlement adequate without addressing the regulatory criteria, *see* 20 C.F.R. §702.243(f), the approval of the medical benefits settlement is vacated and the case is remanded for further consideration. On remand, the parties may either cure the deficiencies by submitting a new settlement application or proceed to a hearing. If the parties submit a new settlement application, the administrative law judge must determine if the agreement comports with the regulations, and he must make explicit findings whether the amount agreed to is adequate pursuant to the regulatory criteria.

Accordingly, the administrative law judge's Decision and Order Approving Settlement of Future Medical Benefits is vacated. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge