BRB No. 03-0165

HOWARD E. JACOB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ATLANTIC ELECTRICAL SUPPLY COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: Oct. 28, 2003
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Formal Denial of Section 8(i)(B) Medical Settlement of Michael Niss, Director, Office of Workers= Compensation Programs, Division of Longshore and Harbor Workers= Compensation, United States Department of Labor.

Howard E. Jacob, Cowan, Tennessee, *pro se.*

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant, without assistance of counsel, appeals the Formal Denial of Section 8(i)(B) Medical Settlement (OWCP No. 40-115189) of Michael Niss, Director, Office of Workers= Compensation Programs, Division of Longshore and Harbor Workers= Compensation, rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers= Compensation Act, 33 U.S.C. '901 *et seq*. (1982), as extended by the District of Columbia Workmen=s Compensation Act, 36 D.C. Code ''501, 502 (1973)(the Act). The determination of the district director must be affirmed unless it is shown to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See, e.g., Sablowski v. General Dynamics Corp./Electric Boat Div.*, 10 BRBS 1033 (1979).

On May 10, 1977, claimant sustained a work-related injury while working for employer in the District of Columbia. Employer voluntarily paid claimant temporary total disability benefits from May 11, 1977 through April 14, 1977, and, in addition, advanced claimant the lump sum of $750 in October 1977. In April 1978, the district director approved the parties= settlement under Section 8(i)(A) of the Act, 33 U.S.C. '908(i)(A) (1972). The parties agreed to compromise claimant=s claim for compensation for amounts previously paid, an additional lump sum of $6,500, plus an attorney=s fee of $1,100. Employer agreed that it remained liable for medical benefits causally related to the injury. The settlement document stated that claimant sustained injuries to his back and left hip in the work accident.

In September 2000, claimant, proceeding without counsel, and employer submitted to the district director an application for approval of a Section 8(i) settlement. This document stated that in exchange for employer=s release from liability, claimant would receive $9,000 as compensation and $1,000 as medical benefits. By letter dated October 5, 2000, an Office of Workers= Compensation Programs (OWCP) claims examiner advised employer that the claim for disability compensation had been settled, and that therefore any agreement between the parties could only be for medical benefits pursuant to Section 8(i)(B), 33 U.S.C. '908(i)(B) (1982). By letter dated March 8, 2001, the district director rejected the settlement as inadequate given claimant=s life expectancy, the possibility of hip replacement surgery as discussed by Dr. Brown, and claimant=s other sources of income. The district director noted that the OWCP does not recognize Medicare as a valid collateral source for payment of medical expenses.

In April 2001, the parties submitted another settlement agreement to the district director. This agreement proposed that claimant receive $13,000 as compensation and $5,000 for medical expenses. The district director rejected this settlement, stating that employer had failed to verify the 1978 settlement of the compensation claim, that any settlement could be for medical benefits only, and that $5,000 was inadequate for claimant=s future medical benefits.

The parties again attempted to settle the claim by agreement submitted on May 30, 2001. This agreement called for claimant to receive $500 in compensation and approximately $17,500 in medical benefits. By letter dated June 14, 2001, the district director rejected the medical benefits settlement as inadequate given claimant=s life expectancy, his loss of collateral benefits upon receipt of the funds, and the possibility of future surgery. Claimant responded to the OWCP that he would lose only his SSI benefits of $59 per month and his food stamp allotment of $20 per month if the case settled, but that he would not lose his $491 in monthly Social Security benefits.

The parties submitted another settlement agreement to the district director on July 29, 2002. This agreement allocated $500 to compensation and $17,500 to medical

benefits.[1] The agreement noted that claimant had incurred medical expenses of $670.71 over the previous three years. On October 16, 2002, the Director issued a formal denial of the parties= Section 8(i)(B) medical settlement application. He stated that the settlement amount would be adequate if claimant continued to need only conservative care. However, if claimant needs to undergo hip replacement surgery, the amount is not adequate as the procedure would cost between $25,000 and $35,000. The Director noted that claimant has no private medical insurance or financial assets to help defray the cost of his medical care. The Director also stated that Medicare is not a collateral source for payment of claimant=s work-related medical bills, as work-related conditions are excluded from the scope of Medicare=s coverage. Concluding that the settlement was not in claimant=s best interests, the Director denied the settlement application.

[1] The agreement notes that claimant received a $3,000 advance from employer so that the total payout would be $15,000.

Employer moved for reconsideration of the denial.[2] Employer contended that, based on Dr. Bagby=s report and claimant=s own representations, claimant=s hip condition is not a work-related condition for which claimant seeks medical treatment and that any hip replacement surgery would not be the responsibility of employer.[3] The Director denied the motion for reconsideration on the ground that, from the outset, the claim involved an injury to claimant=s hip. The Director noted Dr. Bagby=s opinion regarding the need for hip replacement surgery, but stated that the opinion of Dr. Brown could not be ignored.[4] The Director also addressed claimant=s statement that he would use the settlement proceeds for housing needs, stating that this would further deplete the funds available for medical purposes. Finally, the Director again noted the absence of any other viable collateral sources of funds available to pay medical bills. On appeal, claimant, without the assistance of counsel, challenges the denial of the parties= July

[2] This motion for reconsideration was not timely filed, as it was dated 28 days after the Director=s order was filed. 20 C.F.R. '802.206(a), (b)(1). For this reason, claimant=s appeal, filed on October 29, 2002, was timely filed. *See* 20 C.F.R. '802.206(f). The Director nonetheless addressed employer=s motion for reconsideration and, as it sheds further light on the Director=s basis for denying the settlement, we also discuss the Director=s denial of employer=s motion.

[3] In his report of October 30, 2002, Dr. Bagby noted that claimant denied any hip pain. Dr. Bagby reported that the x-rays of claimant=s hips are essentially normal as was his examination of claimant=s hips. He stated that there is no indication that claimant will need hip replacement surgery. The file also contains correspondence from claimant to Dr. Brown wherein claimant challenges Dr. Brown=s assertions that claimant complained of hip pain and alleges that Dr. Brown never told him he might require hip replacement surgery.

[4] Dr. Brown=s records date to 1997. At that time, claimant was complaining of hip pain, and Dr. Brown stated that claimant=s hip x-ray showed degenerative changes. In January 2001, Dr. Brown stated claimant will Amost likely need to consider Total Hip Arthroplasty.@ On August 1, 2001, Dr. Brown wrote to the carrier that old medical notes from Anne Arundel Medical Center indicate hip pain in connection with a worker=s compensation claim.

2002 medical settlement application.[5] Employer has not responded to this appeal.

[5] We are perplexed by our concurring colleague=s opinion which, *sua sponte*, questions the propriety of the Board=s jurisdiction in this case. First, there is no basis for questioning the Fifth Circuit=s decision in *Marine Concrete, Inc. v. Director, OWCP*, 645 F.2d 484, 13 BRBS 351 (5th Cir. 1981), as it is well established, in accordance with the opinion of the Director, Office of Workers= Compensation Programs, that a reference in the statute to the ASecretary@ precludes any role for an administrative law judge. *See, e.g.*, 33 U.S.C. ''907(b), (c), (d)(2); 939; *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting); *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989). These statutory provisions, as with the statutory provision at issue here, 33 U.S.C. '908(i)(B) (1982), involve discretionary findings by the Secretary or her designees, and such findings are properly appealed directly to the Board for review under the abuse of discretion standard. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert.*

denied, 531 U.S. 956 (2000) (rejecting the premise of *Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981), that a party has entitlement to a hearing before an administrative law judge in any case); *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988). Second, the Board, in an *en banc* decision, has previously rejected our colleague=s reliance on *Lukman v. Director, OWCP*, 896 F.2d 187, 12 BLR 2-333 (10th Cir. 1990), and *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989), as inapposite to proceedings under the Longshore Act. *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting). *Lukman* and *Pyro Mining* arise under the Black Lung Act, which has a different set of regulatory criteria, and more importantly, present issues requiring findings of fact, which is the function of the administrative law judge. *Brown*, 30 BRBS at 32 and n. 3 (noting the Director=s opinion regarding *Lukman=s* inapplicability to Longshore cases). In contrast, the instant case does not present any issues requiring findings of fact, but involves only the discretionary determination by the Director that the settlement was not in claimant=s best interests.

The version of Section 8(i)(B), addressing the settlement of claims for medical benefits, applicable here, states:

> Whenever the Secretary determines that it is for the best interests of the injured employee entitled to medical benefits, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such medical benefits. . . .

33 U.S.C. ' 908(i)(B) (1982);[6] *see Marine Concrete, Inc. v. Director, OWCP*, 645 F.2d 484, 13 BRBS 351 (5th Cir. 1981); 20 C.F.R. ' 702.242 (1984). In finding that the settlement was not in claimant=s best interest, the Director rejected the contention that claimant=s hip condition was not related to the work injury and that claimant is not in need of hip replacement surgery. The 1978 settlement agreement states that claimant sustained a work-related lumbar and left hip injury on May 10, 1977. Dr. Brown=s records state that he reviewed old medical records indicating a work-related hip condition. The Director, therefore, rationally concluded that claimant suffered a work-related injury to his left hip.

The Director then found that the proposed medical settlement is inadequate to cover claimant=s future medical needs should he require a total left hip replacement. Dr. Brown stated that hip replacement surgery is a possibility and that such a procedure would cost $25,000 to $35,000. The Director stated he considered Dr. Bagby=s report of October 30, 2002, that claimant will not require such a procedure, but that he cannot ignore Dr. Brown=s contrary prognosis with respect to claimant=s left hip problem. As Dr. Brown has been claimant=s treating physician, the Director did not err in refusing to discount his opinion regarding the need for hip replacement surgery. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); 20 C.F.R. ' 702.242(b) (1984).

Furthermore, the Director properly determined from the settlement documents that there is no evidence that claimant has any viable assets or private health insurance to assist in the payment of future medical care. While claimant has Medicare coverage, the Director properly found that Medicare is not a collateral source for payment of future medical expenses, as Medicare is, at best, the secondary payer of benefits for work-related injuries. See 42 C.F.R ' ' 411.40, 411.46. Finally, the Director stated that claimant indicated that he will spend a majority of the settlement proceeds to secure better housing, rather than for their specifically intended purpose of covering claimant=s future medical expenses. The Director

[6] The 1984 Amendments to the Longshore Act are not applicable to the 1928 D.C. Act. *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

stated that this use of the funds would increase claimant=s inability to pay for his future medical needs causally related to the 1977 work accident.

Given the medical evidence submitted to the Director, and claimant=s lack of collateral sources for payment of his future medical bills, and as the proposed settlement was for less than the cost of the hip replacement surgery, the Director did not abuse his discretion in finding that the settlement was inadequate and therefore not in claimant=s best interest. *See Sablowski,* 10 BRBS 1033. Consequently, we affirm the Director=s denial of the parties= proposed Section 8(i)(B) medical settlement. Employer remains liable for all reasonable and necessary medical expenses related to claimant=s work injury. 33 U.S.C. ' 907.

Accordingly, the Director=s Formal Denial of Section 8(i)(B) Medical Settlement is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur wholeheartedly in the majority=s decision on the merits. I write separately to address the Board=s exercise of jurisdiction in this appeal of the Director=s decision disapproving a settlement for medical benefits only under 33 U.S.C. ' 908(i)(B) (1982), and its implementing regulation 20 C.F.R. ' 702.242(c) (1984).

In 1984, the Longshore Act was amended and Section 8(i)(B) was replaced by Section 8(i)(2) which is implemented by 20 C.F.R. ' 702.243(c). Because the 1984 Amendments do not apply to the 1928 D.C. Act, 33 U.S. C. ' 908(i)(B) (1982) is the applicable statutory provision. The only court to have construed that provision, the United States Court of Appeals for the Fifth Circuit, has held that only the Secretary of Labor or her designee has the authority to approve a settlement for medical benefits and that the Office of Administrative Law Judges has no role in that determination. *Marine Concrete Inc. v. Director, OWCP,* 645 F.2d 484, 13 BRBS 351 (5th Cir. 1981). Hence, any appeal of the Director=s decision must come to the Board.

I believe that the correctness of the court=s interpretation is drawn into question by the subsequent revision of the statute to specifically provide that a disappointed party must go to the Office of Administrative Law Judges before appealing to the Board and I disagree with the Fifth Circuit=s analysis, holding that the Board may entertain an appeal of the Director=s decision without any explicit, statutory or regulatory authority. That view was rejected by the Seventh Circuit in *Pearce v. Director, OWCP,* 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981), holding that the Board lacked jurisdiction over an appeal of the Director=s denial of a lump sum award. Similarly, the Tenth Circuit held in *Lukman v. Director, OWCP,* 896 F.2d 187, 12 BLR 2-332 (10th Cir. 1990), that the Board lacked jurisdiction to review the district director=s denial of a duplicate Black Lung claim because there was no explicit statutory or regulatory authority for this review. The court observed that the Secretary had authorized the Board to review orders of a deputy commissioner in only two instances: commutation of black lung benefits, *see* 20 C.F.R. ' 725.571(c), and attorney fee awards in black lung cases, *see* 20 C.F.R. ' 725.366(e). *See also Pyro Mining Co. v. Slaton,* 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989) (holding the Board lacked jurisdiction to review the deputy commissioner=s determination on good cause for untimely controversion). *But see Healy Tibbitts Builders, Inc. v. Cabral,* 201 F.3d 1090 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 531 U.S. 956 (2000) (holding the deputy commissioner=s attorney=s fee award in Longshore cases is subject to direct review by the Board, notwithstanding the lack of explicit regulatory authority in 20 C.F.R. ' 702.132, although that authority is provided in the Black Lung regulations, discussed above). Whether or not the Fifth Circuit correctly decided the issue of the Board=s jurisdiction in the instant case, I will follow its decision.

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REGINA C. McGRANERY

Administrative Appeals Judge