BRB No. 91-850

BENJAMIN VINCENT	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Carol B. Feinberg (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (90-LHC-716) of Administrative Law Judge Martin J. Dolan, Jr., awarding benefits 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant first worked for employer in 1943 and 1944. He was rehired as an electrician in 1952. Tr. at 17. In 1971, claimant was promoted to ship superintendent in which capacity he was employed until he voluntarily retired at age 61 on September 30, 1988. Tr. at 13, 18, 23-24. Claimant was exposed to asbestos in the course of his employment, and asbestosis was first diagnosed in January 1981. Tr. 6-7, CX 1. Pursuant to the workers' compensation laws of Connecticut, employer agreed to compensate claimant for a 7.5 percent whole man impairment for his work-related asbestosis. Ex. 6. Claimant subsequently filed a claim for benefits under the Act. The district director[1] held an informal conference on September 20, 1989, wherein employer raised the applicability of Section 8(f) relief. *See* Director's Opposition to Employer's Request for Section 8(f) Relief, Affidavit and Motion to Dismiss that Request (Director's Opposition); 33 U.S.C. §908(f). Employer was afforded 30 days to submit a Section 8(f) application, which it did in a timely manner. *Id.* On October 27, 1989, the district director found the application insufficient as there was no medical evidence establishing that claimant's permanent disability is not due solely to the second injury, asbestosis, and no medical evidence that claimant's disability is materially and substantially greater than that which resulted from the subsequent injury alone. *Id.* The district director informed employer it had until November 17, 1989, to correct the deficiencies and to submit a new application. Employer, however, did not submit a new application.

The case was referred to the Office of Administrative Law Judges on December 27, 1989, and a hearing was held on September 13, 1990. The parties agreed that claimant was entitled to benefits under the Act for a 7.5 percent impairment of the whole man due to asbestosis.[2] *See* 33 U.S.C. §908(c)(23)(1988). The sole issue in dispute was employer's request for Section 8(f) relief. Tr. at 6. With regard to the Section 8(f) issue, in transferring the case to the Office of Administrative Law Judges, the district director stated that employer raised Section 8(f) before him but that employer's request for Section 8(f) relief is barred under Section 8(f)(3) because employer failed to submit a timely, complete application. Director's Opposition - Ex. A; 33 U.S.C. §908(f)(3) (1988). Although the Director opposed employer's application, raising the Section 8(f)(3) bar in a brief submitted to the administrative law judge, he did not appear at the formal hearing. Citing *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), the administrative law judge found that he has the authority to consider the applicability of Section 8(f)(3) notwithstanding the district director's opinion that the bar applies. He concluded, without reviewing the original application, that employer complied with Section 8(f)(3) because it timely raised the issue of Section 8(f) before the district director and because it submitted a statement and the grounds for Section 8(f) relief. Decision and Order at 5. Thus, the administrative law judge determined that employer is

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute. The term "district director" shall be used in this decision except where the statute is quoted.

[2]The parties further agreed that employer was entitled to a credit of $16,774.16 against benefits payable under the Act from proceeds claimant received pursuant to third party recoveries from asbestos manufacturers. *See* 33 U.S.C. §933(f); *see also* Tr. at 5-6; Claimant's Proposed Findings of Fact and Law at 2.

entitled to have its Section 8(f) application considered on the merits. *Id*. The administrative law judge then concluded that each element of Section 8(f) is satisfied and that employer is therefore entitled to Section 8(f) relief. Decision and Order at 5-6. The Director appeals the decision, arguing that employer's claim for Section 8(f) relief is barred by Section 8(f)(3). Employer has not responded to the Director's appeal.

The Director contends the administrative law judge erred in denying the Director's motion to dismiss employer's application for Section 8(f) relief because it failed to satisfy the requirements of Section 8(f)(3) of the Act and Section 702.321 of the regulations.[3] 33 U.S.C. §908(f)(3) (1988); 20 C.F.R. §702.321. The Director also argues that the administrative law judge's finding that employer satisfied the requirements of Section 8(f)(3) and the regulations is not supported by substantial evidence because the administrative law judge did not review the original application as employer failed to submit the application for Section 8(f) relief into evidence.

Section 8(f)(3) of the Act provides:

> 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, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. 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) (1988). Section 702.321 of the regulations, which is used in implementing the statute, requires employer to submit a "fully documented application" and defines the term "fully documented." 20 C.F.R. §702.321(a). Further, it provides that "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" unless such failure is excused because employer could not have reasonably anticipated the liability of the special fund prior to the district director's consideration of the claim. 20 C.F.R. §702.321(b)(3). Where the Director has properly raised the Section 8(f)(3) defense in proceedings before the administrative law judge, the administrative law judge may not consider the merits of employer's Section 8(f) application without first fully considering whether the application is sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulations. *Fullerton v. General Dynamics Corp.*, 26 BRBS 133, 138 (1992); *Tennant v. General Dynamics Corp.*, 26 BRBS 103, 108 (1992); *see also Cajun Tubing Testors v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT) (5th Cir. 1992), *aff'g* 24 BRBS 248 (1991); *Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991), *aff'g Bailey v. Bath Iron Works Corp.*, 24 BRBS 229

[3]The Director does not present any argument with respect to the administrative law judge's findings concerning the merits of Section 8(f); the Director challenges only the administrative law judge's determination to reach the merits of employer's Section 8(f) request.

(1991); 20 C.F.R. §702.321(a), (b), (c). The Section 8(f)(3) bar is an affirmative defense which must be raised and pleaded by the Director. *See Tennant*, 26 BRBS at 107, 109; *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990); 20 C.F.R. §702.321(b)(3).

For the reasons set forth in *Tennant*, 26 BRBS at 103, we hold that the administrative law judge erred in proceeding to consider the merits of employer's request for Section 8(f) relief without first considering whether employer's application for Section 8(f) relief was sufficiently documented pursuant to the applicable regulations.[4] We note that, inasmuch as the application was not included in the record, the administrative law judge had an inadequate basis for denying the Director's motion to dismiss. Since the application is not in the record before us, we will not address any issues relating to the sufficiency of the application or whether the district director properly found it inadequate. The administrative law judge must make his own conclusions on remand based on a *de novo* review of the application and other relevant evidence. *Compare Bath Iron Works*, 950 F.2d at 60, 25 BRBS at 64 (CRT), *with Cajun Tubing Testors*, 951 F.2d at 75-76, 25 BRBS at 111-112 (CRT). Because the regulation requires that the district director attach a copy of the application when forwarding the case to the Office of Administrative Law Judges and the Section 8(f) bar is an affirmative defense, the burden is on the Director to submit employer's application for Section 8(f) relief into evidence. *Tennant*, 26 BRBS at 109.

If the administrative law judge finds that the Section 8(f)(3) absolute bar does not apply, he then may consider the merits of employer's request for relief pursuant to Section 8(f). If he finds that the bar applies, the request for Section 8(f) relief must be denied. Therefore, we vacate the administrative law judge's denial of the Director's motion to dismiss and his award of Section 8(f) relief to employer, and remand the case for reconsideration of whether employer's Section 8(f) application was sufficient to meet the

[4]We note that in this case the Director concedes employer's entitlement to have the issue of the sufficiency of its Section 8(f) application decided by the administrative law judge. This aligns the case more closely with *Tennant* than with *Fullerton*. *See Fullerton*, 26 BRBS at 138 n. 5.

requirements of Section 8(f)(3) of the Act and Section 702.321 of the regulations. On remand, the administrative law judge must reopen the record for submission of the Section 8(f) application originally filed by employer with the district director and any other relevant evidence.

Accordingly, that part of the Decision and Order of the administrative law judge denying the Director's motion to dismiss and awarding employer Section 8(f) relief is vacated, and the case is remanded for further consideration in accordance with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge