BRB No. 03-0796

ALFRED J. BRISKIE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	DATE ISSUED: Aug. 25, 2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Respondent	)	

Appeal of the Order of Forfeiture of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor, and the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Daniel A. Dutton (Grey & Grey, L.L.P.), Farmingdale, New York, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

Richard A. Seid (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:

Claimant appeals the Order of Forfeiture (2002-LHC-00102) of Administrative Law Judge Ainsworth H. Brown and the Decision and Order Denying Benefits (2003-LHC-00539) of Administrative Law Judge Ralph A. Romano rendered 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 administrative law judges' 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).

Claimant injured his right knee on December 15, 1999, when he fell from a ladder in the course of his employment. Employer voluntarily paid temporary total disability benefits from December 16, 1999, to September 6, 2000. Claimant filed a claim for compensation under the Act on June 1, 2000. On August 22, 2000, Dr. Sultan opined that claimant would reach maximum medical improvement by September 2000, and claimant returned to unrestricted work on September 20, 2000. Emp. Ex. 20.

On November 30, 2000, claimant filed a claim under the Jones Act. On October 1, 2001, employer filed Form LS-18 with the district director, requesting referral of the compensation claim to the Office of Administrative Law Judges (OALJ). The contested issues identified by employer included coverage, disability, maximum medical improvement, average weekly wage, and timeliness. Employer also served a Form LS-200, Request for Earnings, on claimant, seeking information on any earnings from employment or self-employment claimant had for the period between December 15, 2000, and "present."[1] The district director referred the claim for a hearing on October 9, 2001.

Claimant did not respond to the LS-200 request. Employer renewed its request for earnings information on November 5, 2001, but again claimant did not respond. Subsequently, employer filed a "Charge of Failure to Submit Requested Report of Earnings and Motion for Issuance of an Order of Forfeiture" with the OALJ on November 28, 2001. On December 13, 2001, Administrative Law Judge Ainsworth Brown issued a show cause order requiring claimant to respond to the motion by December 31, 2001.[2] Claimant did not respond to the administrative law judge's show cause order. Consequently, on February 11, 2002, Judge Brown issued an Order holding

[1] Employer had previously requested wage information from claimant for the period from December 15, 1999 to "present." Claimant completed this form on December 19, 2000. Cl. Ex. D.

[2] The administrative law judge reissued his show cause order on December 20, 2001, based on the information that claimant might be unrepresented by counsel.

that claimant's entitlement to benefits after October 1, 2001, is forfeited, pursuant to Section 8(j) of the Act, 33 U.S.C. §908(j), until such time as claimant submitted Form LS-200. Claimant did not appeal this order.

On November 20, 2002, claimant requested a hearing on the issue of his entitlement to a scheduled permanent partial disability award based on an impairment to his right knee.[3] At the hearing before Administrative Law Judge Ralph Romano (the administrative law judge) on May 7, 2003, the parties stipulated that claimant suffers a 25 percent impairment of the lower extremity. However, employer contended that the previous forfeiture order provided a complete defense to its liability for such benefits. Subsequent to the hearing, but prior to the administrative law judge's decision, claimant filed a Report of Earnings, covering his earnings from September 17, 2000, to the present.

In his decision, the administrative law judge rejected claimant's contention that Section 8(j) is not applicable because employer was not paying compensation to claimant at the time employer requested the earnings information. The administrative law judge found that because claimant was pursuing a claim for benefits at that time, Section 8(j) is applicable. Thus, because claimant did not timely file the appropriate response to the LS-200 request for a report of earnings, the administrative law judge found that claimant forfeited his entitlement to benefits for all periods prior to June 27, 2003. Consequently, the administrative law judge denied the claim for permanent partial disability benefits.

On appeal, claimant contends that the administrative law judge erred in finding that Section 8(j) applies in this case, arguing that it is inapplicable pursuant to 20 C.F.R. §702.285(a) because employer requested earnings at a time when it was not paying benefits to claimant. Claimant also contends that Section 8(j) is not applicable when the claim is for scheduled permanent partial disability benefits, as entitlement to scheduled benefits is not dependent on a showing of a loss of wage-earning capacity and thus, claimant contends his post-injury earnings are irrelevant. Employer responds, first contending that claimant's failure to appeal Judge Brown's forfeiture order precludes him from raising challenges to the Section 8(j) findings, and alternatively, urging affirmance

[3] Subsequent to the issuance of Judge Brown's Order of Forfeiture, claimant dropped his Jones Act suit, informing employer he intended to seek only compensation under the Longshore Act. As the issue of coverage under the Act was the sole issue then in dispute between the parties, employer sought and obtained an order dated April 17, 2002, from Administrative Law Judge Paul Teitler remanding the case to the district director.

of the administrative law judges' decisions.[4] The Director, Office of Workers' Compensation Programs (the Director), responds, averring that claimant is not procedurally barred from raising the Section 8(j) issue on appeal. The Director further contends that as claimant was not a "disabled employee" within the meaning of Section 8(j), as implemented by the regulation at 20 C.F.R. §702.285(a), at the time employer issued the LS-200, employer could not require him to file a report on earnings or obtain a forfeiture order when claimant failed to comply in a timely manner. Thus, the Director urges the Board to reverse the forfeiture orders of Judges Brown and Romano, and award claimant permanent partial disability benefits pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2).

We first address employer's contention, raised in its response brief, that Judge Brown's forfeiture order was a final order which claimant did not timely appeal. *See Dalle-Tezze v. Director, OWCP*, 814 F.2d 129 (3d Cir. 1987); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998). A party to a claim may appeal an administrative law judge's decision to the Board if the party is "adversely affected or aggrieved" by the decision. 20 C.F.R. §802.210(a); *see also* 33 U.S.C. §921(b)(3). The United States Supreme Court has held that in order to be "adversely affected or aggrieved," a litigant must show "that he is injured *in fact* by agency action and that the interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 514 U.S. 122, 126-127, 29 BRBS 87, 89(CRT) (1995) (emphasis added); *see also Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd mem.*, No. 04-60040 (5th Cir. Aug. 12, 2004). Moreover, the Board generally decides appeals only from *final* decisions or orders, as interlocutory orders are subject to review upon the issuance of a final decision. *See, e.g., Newton v. P&O Ports Louisiana, Inc.*, 38 BRBS 23 (2004); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

In the present case, claimant did not receive compensation at any time after employer sought wage information on October 1, 2001. Although claimant had filed a claim under the Act, it remained pending and unadjudicated. Therefore, claimant was not adversely affected or aggrieved in fact by Judge Brown's order until Judge Romano relied on it to deny claimant compensation to which the parties agreed claimant was otherwise entitled. *See generally Sharpe v. George Washington Univ.*, 18 BRBS 102 (1986). Moreover, the parties raised before Judge Romano the applicability of Section

[4] We deny employer's motion for oral argument dated August 4, 2004, inasmuch as the Board is required to issue its decision within one year of the date claimant's appeal was filed on August 26, 2003. *See* Pub. L. No. 108-199, 118 Stat. 3 (2004); 20 C.F.R. §§802.305, 802.306.

8(j) and he independently addressed its applicability in his decision. Therefore, Judge Brown's order did not conclusively resolve the issue. *See generally Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995). Consequently, claimant's appeal of the decision of both administrative law judges is properly before the Board at this time.

On appeal, claimant contends that as he was not receiving compensation benefits at the time employer requested the report of earnings, he was not obligated to submit the earnings report, pursuant to 20 C.F.R. §702.285(a). Claimant alternatively contends that Section 8(j) should not be applied to an award under the schedule, as any earnings he may have are irrelevant to his entitlement to such an award, which is based solely on the degree of physical impairment. Thus, claimant contends, the administrative law judge erred in finding that Section 8(j)'s forfeiture provisions apply under the facts in this case. Finally, claimant contends that if Section 8(j) is applicable, he is entitled to full benefits as of the date he complied with the request for earnings, June 23, 2003. The Director also states that Section 8(j) and its implementing regulations allow an employer to request earnings information only if employer is paying the employee compensation when it submits the form. Consequently, the Director contends, without a valid demand, employer is not entitled to invoke the statutory forfeiture of benefits if the employee fails to respond timely or accurately.

Section 8(j) of the Act provides:

> (1) The employer may inform *a disabled employee* of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.
>
> (2) An employee who-
>
> (A) fails to report the employee's earnings under paragraph (1) when requested, or
>
> (B) knowingly and willfully omits or understates any part of such earnings,
>
> and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.
>
> (3) Compensation forfeited under the subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

33 U.S.C. §908(j) (emphasis added);[5] *see, e.g., Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (2003); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). The Secretary of Labor has implemented Section 8(j) through the regulations at 20 C.F.R. §§702.285 and 702.286. Relevant to the instant case, Section 702.285(a) states:

> An employer, carrier or the Director (for those cases being paid from the Special Fund) may require *an employee to whom it is paying compensation* to submit a report on earnings from employment or self-employment. This report may not be required any more frequently than semi-annually. . . . The employee must return the complete report on earnings even where he or she has no earnings to report.

20 C.F.R. §702.285(a) (emphasis added).

In his Order of Forfeiture, Judge Brown found that claimant did not respond at all to the request for earnings and thus forfeited his right to future compensation pursuant to Section 8(j)(2)(A) of the Act and Section 702.286(a) of the regulations.[6] In his Decision and Order, Judge Romano addressed claimant's contention that Section 8(j) is not applicable because employer was not paying claimant benefits when it requested an earnings report. The administrative law judge relied on the Board's decision in *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997), to find that Section 8(j)'s applicability is not contingent on employer's paying compensation at the time the earnings request is made. The administrative law judge interpreted *Plappert* as holding that an employer is entitled to request earnings information, whether or not claimant was receiving compensation or had been

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[5] Pursuant to 20 C.F.R. §702.105 the term "district director" has replaced the term "deputy commissioner" used in the statute.

[6] Section 702.286(a) states:

> Any employee who fails to submit the report on earnings from employment or self-employment under Sec. 702.285 or, who knowingly and willingly omits or understates any part of such earnings, shall upon a determination by the district director forfeit all right to compensation with respect to any period during which the employee was required to file such a report. The employee must return the completed report on earnings (even where he or she reports no earnings) within thirty (30) days of the date of receipt; this period may be extended for good cause, by the district director, in determining whether a violation of this requirement has occurred.

20 C.F.R. §702.286(a).

adjudicated to be entitled to compensation, if claimant intends to pursue a claim for benefits. Decision and Order at 5.

In *Plappert*, however, the Board addressed the meaning of the phrase in Section 8(j)(2), "any period during which the employee was required to file such report[,]" and held that this period can include only those periods during which the employee was "disabled," pursuant to Section 8(j)(1). *Plappert*, 31 BRBS at 14-16. The Board also stated that under-reporting or omissions of earnings during periods prior to "the claimed period of disability" do not affect the employer's liability for, or the claimant's entitlement to, benefits. *Plappert*, 31 BRBS at 17; *see also Denton v. Northrop Corp.*, 21 BRBS 37 (1988). The administrative law judge in the instant case found that the effect of this language is that an employee can be the subject of a request for earnings, whether or not the employee is in payment status, if the employer may have to pay benefits for the period during which it requests an earnings report. We reject this interpretation of *Plappert* in view of the express regulatory language, which we will now discuss. *Plappert* involved the *scope* of the request for earnings; this case involves the *timing* of the request for earnings.

Section 8(j) states that "[t]he employer may inform a *disabled employee*" of the obligation to disclose earnings upon request. 33 U.S.C. §908(j)(1) (emphasis added). The word "disabled" is not further defined in Section 8(j). The administrative law judge found that claimant was a "disabled employee" because he had filed and was pursuing a claim for compensation under the Act. The regulation implementing Section 8(j), however, states that employer may request an earnings statement from an "employee to whom [the employer] is paying compensation." 20 C.F.R. §702.285(a). Claimant and the Director contend that the regulation is consistent with the legislative history of Section 8(j), and that as employer was not paying claimant compensation on October 1, 2001, Section 8(j) is not applicable in this case.

The legislative history of Section 8(j) explains that Congress intended to limit the reporting obligation and the forfeiture penalty to employees who are receiving compensation concurrently with the request for earnings information. With respect to the proposed provision for allowing earnings reports, the House Committee on Education and Labor stated that such reports "are intended to be a device by which employers maintain some control over *claims in payment status."* H.R. Rep. No. 98-570(I) at 18 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 2751 (emphasis added); *see also Plappert*, 31 BRBS at 17 (noting that one purpose of Section 8(j) "is to keep an employer informed about the employee's post-injury earning capacity"). The committee report also states that forfeiture could be invoked "[w]hen an *employee who is receiving compensation benefits* has been served with a request by the employer to report earnings from employment or

self-employment and fails to do so…." H.R. Rep. No. 98-570(I) at 18, *reprinted in* 1984 U.S.C.C. A.N. at 2751.[7]

Congress delegated to the Secretary of Labor the authority to prescribe rules and regulations under the Act. 33 U.S.C. §939(a). In turn, the Secretary of Labor delegated to the Office of Workers' Compensation Programs, the head of which is the Director, "all functions of the Department of Labor with respect to the administration of benefits programs" under the Act. 20 C.F.R. §§701.201, 701.202. The United States Courts of Appeals have generally given special deference to the Director's position on issues involving interpretation or application of the Act because the Director is charged with the administration of the Act. *See, e.g., Rasmussen v. General Dynamics Corp*., 993 F.2d 1014, 27 BRBS 17(CRT) (2d Cir. 1993)*; Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992). Where, as here, the statute contains a somewhat ambiguous phrase, "disabled employee,"[8] the agency's interpretation of the statute through a regulation must be "'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *Household Credit Services, Inc. v. Pfennig*, 124 S.Ct. 1741, 1747 (2004), quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-844 (1984); *see also BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680 (l991); *Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990). The United States Court of Appeals for the Fifth Circuit has stated that "the Director's interpretation of the agency's own regulations is controlling unless that interpretation is plainly erroneous or inconsistent with the text of the relevant regulations." *Galle v. Director, OWCP*, 246 F.3d 440, 449, 35 BRBS 17, 24(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001).

In this case, the Director's regulatory interpretation of the statutory phrase "disabled employee," is not arbitrary, capricious, or manifestly contrary to the statute.

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[7] In addition, the Conference Report emphasizes the agreement of the House and Senate on this issue:

> Both the Senate bill and the House amendment included identical language authorizing employers to require employees receiving compensation to submit a statement of earnings not more frequently than semi-annually. . . The conferees retain this language.

H. Conf. Rept. No. 1027, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. at 2783.

[8] That is, the term standing alone is susceptible to the interpretation given it by the administrative law judge, as well as to other interpretations.

Rather, the plain language of the regulation at 20 C.F.R. §702.285(a) explicitly reflects the legislative history of Section 8(j) and refines the meaning of "disabled." As the Director asserts, claimant does not become a "disabled employee" merely by filing a claim under the Act. By requiring that the claimant be receiving compensation at the time a request for earnings is made, the regulation is consistent with the definition of "disability" contained in Section 2(10) of the Act, which states that a disability "means the incapacity because of injury to earn the wages which the employee was receiving at the time of injury. . . ." 33 U.S.C. §902(10). Moreover, the Director's interpretation of Section 702.285(a) is consistent with the plain language of the regulation. *Galle*, 246 F.3d at 449, 35 BRBS at 17(CRT) As the regulation at Section 702.285(a) provides a rational definition of the phrase "disabled employee" that is consistent with the legislative history and the Act as a whole, the regulation must be applied as written. *See Clinchfield Coal Co. v. Harris*, 149 F.3d 307 (4th Cir. 1998). We therefore hold that, pursuant to 20 C.F.R. §702.285(a), in order for an employer to require claimant to submit an earnings report pursuant to Section 8(j), employer or the Special Fund must be paying compensation to claimant, either voluntarily or pursuant to an award, at the time the request for information is made.[9] If employer or the Special Fund is not paying compensation, the forfeiture provision of Section 8(j) cannot be applied to a claimant who fails to respond timely or accurately to the information request.

In the present case, employer was not paying compensation to claimant when it submitted Form LS-200 requesting earnings information. Thus, we hold that by the explicit terms of the regulation at Section 702.285(a), claimant was not a "disabled employee" who was legally obligated to comply with employer's request or risk forfeiting his benefits under the Act.[10] Therefore, we reverse the decisions of Judges Brown and Romano ordering the forfeiture of benefits pursuant to Section 8(j). Moreover, as the parties agree that claimant is entitled to scheduled permanent partial disability benefits for a 25 percent loss of use of his lower right extremity, Tr. at 5-7, we reverse the denial of benefits and enter an award of benefits based on this agreement. 33 U.S.C. §908(c)(2).

[9] We note that where a claim is being adjudicated, employer has the means to obtain wage information through the discovery process. 33 U.S.C. §927(a); *see Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986).

[10] As we hold that claimant was not a "disabled employee" within the meaning of Section 8(j) at the time employer requested a report of earnings, we need not address claimant's contentions regarding whether Section 8(j) is applicable to scheduled permanent partial disability awards or whether claimant is entitled to payment of the full award upon his compliance with the earnings request in June 2003.

Accordingly, the Forfeiture Order of Judge Brown and the Decision and Order Denying Benefits of Judge Romano are reversed. Judge Romano's decision is modified to award claimant permanent partial disability benefits for a 25 percent loss of use of his lower right extremity pursuant to Section 8(c)(2), (19), pursuant to the parties' agreement.

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