BRB No. 92-498

IRVIN M. LASSITER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NACIREMA OPERATION COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Section 8(f) Relief of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

F. Nash Bilisoly (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for self-insured employer.

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

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

PER CURIAM:

Employer appeals the Decision and Order Denying Section 8(f) Relief (86-LHC-1868) of Administrative Law Judge Daniel A. Sarno, Jr., 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 findings of fact and conclusions of law of the administrative law judge which 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).

Claimant, on January 18, 1983, sustained an injury to his back while in the course of his employment with employer. Claimant subsequently filed a claim for permanent partial disability

benefits under the Act; thereafter, claimant sought permanent total disability benefits based on an August 20, 1985 report of Dr. Morales, in which that physician stated that claimant would be unable to return to work as a longshoreman. Thereafter, on April 2, 1986, an informal conference was held before the district director[1] to discuss the issue of permanent total disability. At that conference, employer requested relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), but did not file a Section 8(f) application as required by the implementing regulations, *see* 20 C.F.R. §702.321; employer was given an extension of time by the district director in which to file the required application.

Subsequently, claimant submitted a pre-hearing statement listing permanent total disability as an issue; employer's pre-hearing statement listed Section 8(f) as an issue. The case was then transferred to the Office of Administrative Law Judges, but was later remanded to the district director. A second informal conference was held on November 4, 1987; employer once again did not file a Section 8(f) application. The case was referred a second time to the Office of Administrative Law Judges, but was again remanded. Employer thereafter requested that another informal conference be held regarding the issue of Section 8(f) relief; this request was denied by the district director.

A formal hearing before the administrative law judge was held on March 22, 1991, at which time employer asserted that it had prepared and mailed its application for Section 8(f) relief to the district director on March 16, 1990. In support of this assertion, employer submitted into evidence its Section 8(f) application and accompanying cover letter addressed to the district director; additionally, employer's counsel testified that he believed that the application was in fact mailed. Tr. 21-22. In a Decision and Order dated May 13, 1991, the administrative law judge awarded claimant permanent total disability benefits commencing on August 20, 1985. Subsequently, in a Decision and Order Denying Section 8(f) Relief dated October 31, 1991, the administrative law judge found that, as the district director's office has no record of employer's application for Section 8(f) relief, employer failed to establish that its Section 8(f) application was received by the district director, notwithstanding the assertions of employer's counsel. The administrative law judge thereafter concluded that, since employer failed to file an application for Section 8(f) relief with the district director, the Director, Office of Workers' Compensation Programs (the Director), was entitled to the absolute defense under Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3)(1988). The administrative law judge accordingly denied employer's request for Section 8(f) relief.

[1] Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced "deputy commissioner" used in the statute.

On appeal, employer contends that the administrative law judge erred in applying the absolute bar to its request for Section 8(f) relief. Specifically, employer argues that, since claimant filed his claim for permanent disability benefits prior to the effective date of the 1984 Amendments to the Act, Section 8(f)(3) does not apply in this case. In the alternative, employer contends that, since it formally requested Section 8(f) relief, mailed its application for Section 8(f) relief, and submitted that application into evidence at the formal hearing, it complied with the intent, if not the actual requirements, of the Act and the regulations. The Director responds, urging affirmance of the denial of Section 8(f) relief; specifically, the Director asserts that since employer's Section 8(f) application was never received by the district director, employer failed to comply with the specific requirements of Section 8(f)(3) and Section 702.321 of the regulations.

Section 8(f)(3) of the Act provides that an employer's request for Section 8(f) relief, and a statement of the grounds for such relief, which is filed after September 28, 1984, must be presented to the district director prior to consideration of the claim by the district director, and that failure to do so will bar the payment of benefits by the Special Fund, unless the employer could not have reasonably anticipated that Special Fund liability would be at issue. 33 U.S.C. §908(f)(3)(1988). The implementing regulations provide that the employer must file with the district director a fully documented application in support of its request for Section 8(f) relief. 20 C.F.R. §702.321(a). The 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. 20 C.F.R. §702.321(b)(3). Such a failure is excused only where the employer could not have reasonably anticipated the liability of the Special Fund prior to the issuance of a compensation order.[2] *Id.*

Employer initially contends that Section 8(f)(3) is not applicable to the instant case since claimant filed his claim for permanent disability benefits prior to the effective date of the 1984 Amendments. We disagree. Contrary to employer's assertion, *Reynolds v. Cooper Stevedoring Company, Inc.*, 25 BRBS 174 (1991), does not support employer's position. In *Reynolds*, the Board noted that since the employer's initial claim for Section 8(f) relief was made prior to effective date of the 1984 Amendments, Section 8(f)(3) did not apply. 25 BRBS at 174, 178 n.4; *see also Verdane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 778 n.5, 17 BRBS 154, 156-157 n.5 (11th Cir. 1985). In the instant case, it is uncontroverted that employer first requested Section 8(f) relief at the initial informal conference held on April 2, 1986, approximately one and one-half years after the effective date of the 1984 Amendments, September 28, 1984. Thus, we hold that the administrative law judge committed no reversible error in applying Section 8(f)(3) to the instant case.

[2]There is no argument regarding this excuse in the case at bar. Permanency was at issue before the district director. *See generally Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT)(5th Cir. 1992), *aff'g* 24 BRBS 248 (1991).

Next, we reject employer's contention that neither Section 8(f)(3) nor the regulations require that an application for Section 8(f) relief be actually "filed." Section 8(f)(3) of the Act specifically states that any request for Section 8(f) relief "*filed* after September 28, 1984, . . ., and a statement of the grounds therefore, shall be presented to the district director." 33 U.S.C. §908(f)(3)(1988)(emphasis added). Furthermore, the headings of Sections 702.321(a) and (b) of the regulations implementing Section 8(f) use the word "filing." *See* 20 C.F.R. §702.321(a), (b). Thus, it is apparent from the plain language of Section 8(f)(3) and its implementing regulations that an application for Section 8(f) relief must be filed with the district director. *See generally Fullerton v. General Dynamics Corp.*, 26 BRBS 133 (1992); *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992).

We additionally reject employer's argument that the language contained in Section 30 of the Act supports a finding that compliance with the requirements of Section 8(f)(3) may be accomplished by the act of mailing the required application for Section 8(f) relief to the district director. Section 30(a) requires that employers send to the Secretary of Labor a First Report of Injury. 33 U.S.C. §930(a). Section 30(d) states that the mailing of any such report to the Secretary and district director shall be compliance with this section. 33 U.S.C. §930(d). We note that this specific language regarding the actions constituting compliance is absent from Section 8(f)(3); we therefore conclude that if Congress had meant for compliance with the requirements of Section 8(f)(3) to be accomplished by the mailing of an application for Section 8(f) relief, it would have included similar language in Section 8(f)(3) itself. We therefore affirm the administrative law judge's conclusion that an application for Section 8(f) relief is not filed within the meaning of the Act and the regulations until it is actually received by the district director.

Employer further contends that the district director erred in refusing to schedule a third informal conference, since this refusal prevented it from filing a Section 8(f) application with that official. We disagree. Employer had ample opportunity to file its application at either the first informal conference in 1986, or the second in 1987. *See Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT)(5th Cir. 1992), *aff'g* 24 BRBS 248 (1991). For reasons not contained in the record, employer chose not to do so; rather, employer allegedly mailed its application for Section 8(f) relief to the district director on March 16, 1990, approximately four years after it initially requested such relief at the April 2, 1986 informal hearing. Employer, therefore, had ample opportunity to file its application for relief; thus, we will not reverse the district director's decision to transfer the case for the third time to the Office of Administrative Law Judges on March 19, 1990.

Lastly, employer contends that the extension of time granted to it by the district director in which to file a Section 8(f) application was open-ended, and that its submission of an application at the formal hearing before the administrative law judge constituted compliance with the Act and regulations. We disagree. The legislative history of Section 8(f)(3) indicates that the purpose of that section is to encourage employers to raise the issue of Section 8(f) relief early in the claims adjudication process to afford the Office of Workers' Compensation Programs the opportunity to examine the validity of the employer's basis for requesting such relief. *See* House Conf. Rep. No.

1027, 98th Cong., 2d Sess. 21, *reprinted in* 1984 U.S. CODE CONG. & ADMN. NEWS 2771, 2781. Thus where, as here, an employer makes a Section 8(f) request, but fails to file a Section 8(f) application, *i.e.*, a statement of the grounds therefor, until the date of the hearing, the purpose of allowing the district director the opportunity to examine the validity of the Section 8(f) request is frustrated.[3] *See Hargrave*, 951 F.2d at 71, 25 BRBS at 109 (CRT). In the instant case, although employer's counsel testified that it was his belief that an application for Section 8(f) relief was mailed to the district director, the administrative law judge, based upon two sworn statements of officers in the district director's office that no record of such an application could be found, determined that employer did not file an application for Section 8(f) relief as required by the Act. *See* Decision and Order Denying Section 8(f) Relief at 3-4; Director's Exhibits I, J. This credibility determination was within the administrative law judge's discretionary authority and is affirmed. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, inasmuch as employer failed to file an application for Section 8(f) relief with the district director, as required by Section 8(f)(3) of the Act and its implementing regulations, we affirm the administrative law judge's holding that the absolute defense applies, and his consequent denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order Denying Section 8(f) Relief is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3] Contrary to employer's assertion, *Currie v. Cooper Stevedoring Company, Inc.*, 23 BRBS 420 (1990), is distinguishable from the instant case. In *Currie*, an employer's request for Section 8(f) relief made before the administrative law judge was considered timely since the grounds for filing such a request became known only *after* the case was referred to the administrative law judge and the employer thereafter promptly notified the Director that Section 8(f) was at issue.