BRB No. 93-473

ROY PARKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DATE ISSUED:_____
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, 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, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-1015) of Administrative Law Judge G. Marvin Bober 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 judge's 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).

On October 17, 1984, claimant filed a claim against employer alleging exposure to asbestos. Dir. Brief at 2. On January 23, 1985, he filed suit in federal court against numerous asbestos manufacturers. *See* Affidavit with attachment. The district director approved a Section 8(i), 33 U.S.C. §908(i) (1982), settlement between claimant and employer on April 30, 1985, which discharged employer's liability for compensation in return for a lump sum payment to claimant of $5,000 and an attorney's fee of $1,000.[1] Comp. Order. Subsequent to his Section 8(i) settlement with employer, claimant entered into settlements with some of the third-party defendants, without first obtaining prior written approval from employer, resulting in an aggregate net recovery to claimant in the amount of $32,401.17. *See* Affidavit with attachment; Emp. Brief at 2.

On September 10, 1990, employer filed a Motion to Dismiss the "claim" pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g) (1988). Specifically, employer sought to prohibit claimant from seeking medical benefits because he failed to comply with the provisions of Section 33(g)(1), (2), 33 U.S.C. §933(g)(1), (2) (1988). The administrative law judge considered employer's motion, noting particularly that claimant has not filed a claim for medical benefits. After explaining the two prongs of the "traditional ripeness analysis," the administrative law judge determined that employer has not met either the fitness of the issue for review or the hardship requirement. Decision and Order at 2-3. Therefore, he found that, as claimant has not filed and may never file a claim for medical benefits, employer is "raising a defense to a speculative claim for benefits and is requesting that the Claimant be barred from future benefits." *Id.* at 3-4. Consequently, he concluded that employer's motion to dismiss is not ripe for adjudication. Further, the administrative law judge determined that he need not consider employer's motion to dismiss because there is no pending claim, given that claimant's right to compensation was disposed of via a Section 8(i) settlement, and that he has no authority to adjudicate a speculative case.[2] He then remanded the case to the district director. *Id.* at 4.

Employer appeals the decision, contending the administrative law judge erred in finding that the issue of whether any future claim for medical benefits is barred by Section 33(g) is not ripe for adjudication. Employer also contends the administrative law judge's order to remand effectively leaves the case open, requiring it to maintain an open file and cash reserves for an indefinite period in preparation for any claim claimant may file. The Director, Office of Workers' Compensation Programs (the Director), responds to the appeal, urging affirmance. Employer replies, arguing that the issue is ripe for adjudication and comparing this case to the situation in *Chavez v. Director,*

[1]Contrary to employer's statement in its reply brief, the settlement did not discuss claimant's entitlement to medical benefits. Therefore, that issue was left open. *See* Comp. Order; Reply Brief at 2.

[2]The administrative law judge noted that Section 14(h) of the Act, 33 U.S.C. §914(h), permits an employer to request a hearing when the right to compensation has been controverted or payments of compensation have been suspended. As neither of these events has occurred, he concluded he has no authority to adjudicate this "claim." Decision and Order at 4.

OWCP, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992).

We reject employer's argument that the Section 33(g) issue is ripe for adjudication. The Board recently discussed the issue of ripeness in its decision in *Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (Brown, J., concurring), *aff'g on recon. en banc* 27 BRBS 250 (1993)(*en banc*)(Brown, J., concurring), noting the conclusion of the United States Court of Appeals for the Ninth Circuit that "[l]ack of ripeness will prevent review if the systematic interest in postponing adjudication due to a lack of fitness outweighs the hardship on the parties created by the postponement." *Boone*, 28 BRBS at 122; *see also Chavez*, 961 F.2d at 1414-1415, 25 BRBS at 141-142 (CRT). In *Boone*, claimant Boone filed a claim under the Act alleging exposure to asbestos. Subsequently, he filed numerous third-party claims against asbestos manufacturers. Employer then requested the case be referred to the Office of Administrative Law Judges, and, nearly three years later, Boone filed a motion to withdraw his claim with the district director. The district director approved the motion to withdraw, and employer appealed the decision to the Board. *Boone*, 28 BRBS at 122. The Board held that the issues raised by employer were not ripe for adjudication, as there was no claim pending, and that employer could not be aggrieved unless or until a new claim was filed. *Id.* at 123-124; *see also Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 135-136 n.14, 28 BRBS 12, 17 n.14 (CRT) (5th Cir. 1994).

In the case now before the Board, it is undisputed that claimant has made no request for medical benefits. Nevertheless, employer contends there is "an open pending claim for medical benefits," and claimant need not file a formal claim to make it official. Reply Brief at 2; *see also* Emp. Brief at 4. According to employer, because there is a "pending claim," the administrative law judge denied its due process rights by violating its right to a hearing on the motion. Common sense dictates, however, that where claimant has settled his claim for compensation and has not requested medical benefits, there is no claim pending; therefore, there can be no issues to decide. *See Boone*, 28 BRBS at 123. Consequently, the issue of whether Section 33(g) bars claimant's potential claim for medical benefits in this matter is premature.[3] Therefore, we reject employer's request to reverse the administrative law judge's finding.[4] As there is no claim to address and no rights to adjudicate,

[3]Employer contends this case is similar to the situation in *Chavez* because the Ninth Circuit determined that the apportionment issue was ripe, despite the lack of evidence on the specifics of any third-party settlements, thereby permitting adjudication of a speculative issue. We disagree. Contrary to employer's argument, the court determined that the issue was ripe because it presented a question of law fit for review and because the parties were not able to settle the third-party agreements without knowing whether Todd Shipyards was entitled to an offset. The inability to settle the claims constituted a hardship which outweighed any interest in postponing adjudication. *See Chavez*, 961 F.2d at 1414-1415, 25 BRBS at 142-143 (CRT). The case at bar, in which employer seeks dismissal of a non-existent claim for medical benefits, presents neither an issue fit for review nor a hardship which outweighs the interest in postponing adjudication of this issue until an actual claim is filed. *See id.*

[4]Moreover, Section 33(g)(1) does not apply in this case, inasmuch as claimant settled his third-party actions for an aggregate net total of $32,401.17, which is greater than the $5,000 in

we also reject employer's argument that it was denied due process.

Employer also contends the administrative law judge erred in remanding the case to the district director without instructions to close or dismiss the claim. Although a remand order does not result in the final disposition of a case, *see Arjona v. Interport Maintenance*, 24 BRBS 222, 223 (1991), employer's fears of an open-ended resolution are unfounded. Given the administrative law judge's finding that there is no claim upon which to act and that employer's defense has been raised prematurely, employer's argument appears to be a matter of semantics only. The original claim for compensation was settled in 1985, and that constitutes the final disposition of the case, unless or until claimant formally files a claim for medical benefits.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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compensation he received pursuant to the Section 8(i) settlement with employer. *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 2597, 26 BRBS 49, 53 (CRT)(1992); *Harris v. Todd Pacific Shipyards Corp.*, BRBS , BRB No. 93-2227 (Oct. 25, 1994).