BRB No. 95-0748

PAUL E. ENEBERG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the November 3, 1994, denial of referral of the case for hearing of Karen P. Goodwin, District Director, United States Department of Labor.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for employer/ carrier.

Mark Reinhalter (J. Davitt McAteer, Acting 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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the November 3, 1994, denial of referral of the case for hearing (OWCP No. 14-90424) of District Director Karen P. Goodwin 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 the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Carter v. Merritt*

Ship Repair, 19 BRBS 94 (1986).

Claimant filed a claim for benefits under the Act on March 24, 1987, alleging work-related asbestos exposure from 1942 to 1943 resulting in an asbestos-related disease. While the claim form did not indicate that claimant had lost time from work due to the alleged injury or that he suffered a permanent disability, it did indicate that claimant had been treated by medical providers for his illness and that the treatment was not provided by employer. Claimant also filed a third-party lawsuit against the manufacturers and distributors of asbestos products. Neither claimant nor employer pressed for the adjudication of claimant's longshore claim for over five years.

In a letter to the district director dated October 5, 1992, employer requested that the claim be referred to the Office of Administrative Law Judges (OALJ) for a formal hearing, since employer wished "to close their claim file on this matter at this time." Attached to the letter was a pre-hearing statement, listing Section 33(g) and the responsible employer as issues to be resolved, and stating: "Claimant has brought suit against the asbestos industry and has made settlements without the written approval of the employer and carrier." Employer's Brief, Attachment B. In a letter dated November 3, 1994, the district director denied employer's referral request, stating that she had been instructed by the Director, Office of Workers' Compensation Programs (the Director), "not to refer cases for formal adjudication of Section 33(g) issues in which there are no presently payable or imminently payable benefits at issue." *Id.*, Attachment A.

Employer then filed this appeal with the Board, challenging the district director's denial of its request for referral of the claim for a formal hearing. Specifically, employer contends that under Section 19(c) of the Act, 33 U.S.C. §919(c), the district director was required to refer the claim for formal adjudication upon employer's request. Employer relies upon the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT)(5th Cir. 1994), in support of its position. Additionally, employer has requested expedited review of this case.

In response, the Director has filed a motion to dismiss the appeal, asserting that employer's appeal should be dismissed for lack of standing and ripeness. The Director argues that since claimant has yet to allege that employer is liable for any disability compensation or to make any claim for medical expenses, employer has failed to demonstrate that under Section 802.201(a), 20 C.F.R. §802.201(a), it has been "adversely

affected or aggrieved" by the district director's decision not to refer the case for a hearing.[1] Thus, the Director asserts, the claim is not ripe for referral to the OALJ and therefore, employer lacks standing to appeal the district director's denial. In support of her position, the Director cites *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).

At issue in both the Director's motion and employer's appeal is whether employer has the right to seek referral of a pending claim for a hearing where claimant does not assert a present entitlement to benefits. If employer is correct that claims, once filed, must be processed, then the district director's order has denied it the right to have a pending claim referred for hearing, and employer has standing as a party-in-interest under Section 21(b)(3), 33 U.S.C. §921(b)(3), to raise that issue before the Board.[2] On the other hand, if the Director is correct that, since claimant has not sought medical or disability benefits, there is no obligation on the part of the district director to take further action, then employer's appeal should be dismissed. We therefore will address the merits of employer's appeal and accept the Director's motion as her response.

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[1] Section 802.201(a) provides in pertinent part:

> Any party or party-in-interest adversely affected or aggrieved by a decision or order issued pursuant to one of the Acts over which the Board has appellate jurisdiction may appeal a decision or order of an administrative law judge or deputy commissioner to the Board by filing a notice of appeal pursuant to this subpart.

20 C.F.R. §802.201(a).

[2]The Director argues that the procedural interests asserted by employer are insufficient to demonstrate it is a party "adversely affected or aggrieved" under Section 802.201(a), citing *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, U.S. , 115 S.Ct. 1278, 29 BRBS 87 (CRT) (1995), *aff'g* 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993). Section 802.201(a) must, however, be construed in a manner consistent with the applicable provision of the Act, 33 U.S.C. §921(b)(3), which authorizes the Board to hear and determine appeals of any party in interest raising a substantial question of law or fact. This standard for an administrative appeal to the Board is thus less stringent than that required for appeal to the United States Courts of Appeals under Section 21(c), 33 U.S.C. §921(c), which was at issue in *Harcum*. *Ingalls Shipbuilding Div., Litton Systems, Inc. v. White*, 681 F.2d 275, 14 BRBS 988 (5th Cir. 1982). Employer in this case asserts that it has a right to an administrative hearing, which is sufficient for it to be considered adversely affected by the denial of that right.

The initial question concerns whether the district director erred in denying employer's request to refer the instant claim to the OALJ for a formal hearing.[3] Section 19(c) of the Act provides that the district director "shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon." 33 U.S.C. §919(c). Pursuant to Section 19(d), 33 U.S.C. §919(d), the hearing is to be conducted by an administrative law judge. While Section 19 imposes a duty on the district director to refer a case for a formal hearing, the Act does not specify the time period for carrying out that duty or the consequences or effects of a delay by the district director's office.

The United States Court of Appeals for the Ninth Circuit, wherein appellate jurisdiction of this case lies, has yet to rule on the issue of whether Section 19 imposes a mandatory duty on the district director to transfer a claim for a formal hearing without delay upon the request of a party. The United States Court of Appeals for the Fifth Circuit, however, addressed this precise issue in *Asbestos Health Claimants*. In that case, the employer requested that the district director refer the asbestos claims of approximately 3,100 former employees to the OALJ for a hearing. After the district director deferred the referral of these claims for several years, the employer filed an action in Federal District Court seeking to compel the district director to transfer these claims for a hearing. The district court granted a writ of mandamus ordering the district director to refer the cases.

In affirming the lower court's decision,[4] the Fifth Circuit held that the district director lacks the discretion to delay ordering a hearing after a request for one has been made. Noting that the language of Section 19(c) is mandatory, the court concluded that to allow the district director discretion to delay performance of this duty, after a request for a hearing has been made, would effectively defeat the mandatory language of this provision. The district director lacks this discretion, the court stated, notwithstanding the administrative concerns the district director raised, and whether or not the employer would be prejudiced by the delay. *Asbestos Health Claimants*, 17 F.3d at 134, 28 BRBS at 16 (CRT). Thus, the court held that Section 19 imposes a mandatory duty on the district director to transfer the case to the OALJ upon the request of a party.

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[3]We disagree with our dissenting colleague's statement that the Board lacks subject matter jurisdiction to address this issue. As discussed, *infra*, the issue is one of statutory interpretation involving Section 19 of the Act, 33 U.S.C. §919, and the Board is authorized to decide questions of law raised by any party with respect to claims under the Act. 33 U.S.C. §921(b)(3). For the reasons stated in *Brown v. Marine Terminals Corp.*, BRBS , BRB Nos. 95-0784, 95-1183 (Feb. 12, 1996)(*en banc*)(Brown and McGranery, JJ., dissenting), and *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting), we also disagree with the assertion that the Board lacks authority to hear an appeal of a district director's decision under certain circumstances. In this case, the Board's refusal to hear employer's appeal on the issue of whether it is entitled to a hearing would deny employer an administrative remedy.

[4]Before addressing the merits, the Fifth Circuit concluded that the district court had jurisdiction to issue the order pursuant to the Mandamus and Venue Act, 28 U.S.C. §1361. *Asbestos Health Claimants*, 17 F.3d at 133, 28 BRBS at 15 (CRT).

The Board earlier reached a similar conclusion in interpreting Section 19 of the Act. In *Black v. Bethlehem Steel Corp.*, 16 BRBS 138 (1984), claimant filed a claim, stating at an informal conference that he had no disability, claimed no compensation at that time, and filed merely to avoid problems with Section 13, 33 U.S.C. §913.[5] Nonetheless, the claim was referred to the Office of Administrative Law Judges for a hearing. After the administrative law judge issued preliminary orders accepting jurisdiction, claimant filed an interlocutory appeal, which the Board accepted. Claimant argued that the Act permitted protective filings, a view which the Director supported. Relying on Section 19(c), which provides that a hearing *shall* be ordered upon request of any party, the Board held that the Act does not provide for "protective filings." Once a claim has been filed, the Act contemplates a thorough yet expeditious resolution and a hearing upon request of any party. *Id*. at 142.

The reasoning in *Black* is consistent with that of the Fifth Circuit in *Asbestos Health Claimants*. We find this case law compelling, as it is based on the strict language of the Act. Specifically, Section 19(c) imposes a mandatory duty on the district director to "order a hearing" upon the application of any interested party. 33 U.S.C. §919(c). As the Fifth Circuit noted, to allow the district director to delay the performance of this duty would defeat the mandatory language of Section 19.

As employer is an interested party with the right to apply for a hearing under Section 19(c), and as we have concluded that a hearing must be held when a party seeks it, it follows that employer is aggrieved by the district director's denial of its request for referral. We reject the Director's argument that the Board's decision in *Boone* supports a contrary proposition on the facts of this case. In *Boone*, claimant filed a claim in 1987 based on work-related asbestos exposure, and subsequently entered into several third-party settlements with asbestos manufacturers and distributors. In 1990, the employer requested that the district director refer the case for a formal hearing. In February 1993, the claimant filed a motion to withdraw his claim with the district director, which the district director approved without prejudice, subject to Section 13, 33 U.S.C. §913, time limitations. The employer filed an appeal with the Board, challenging the district director's approval of the withdrawal as an abuse of discretion. The Board initially dismissed the appeal in an Order, determining that there was no controversy ripe for adjudication. *Boone*, 27 BRBS at 251. In affirming its decision on reconsideration, the Board, following the Fifth Circuit's decision in *Asbestos Health Claimants*, 17 F.3d at 130, 28 BRBS at 12 (CRT), held that the district director failed to perform her mandatory duty by not transferring the case to the OALJ upon request. *Boone*, 28 BRBS at 122. Despite this derogation of duty, the Board concluded that the district director's failure to refer the case for a hearing was harmless because claimant had withdrawn his claim. Furthermore, the Board, relying on *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134

[5]*Black* was an occupational disease case decided prior to implementation of the 1984 Amendments. Prior to the 1984 Amendments, a claim, in order to be timely, had to be filed within one year of claimant's awareness of a disease related to employment, without regard to claimant's disability status. *Black*, 16 BRBS at 142 n. 5.

(CRT)(9th Cir. 1992),[6] reaffirmed its initial holding that there was no controversy ripe for adjudication, as the employer failed to show that it had been adversely affected by claimant's withdrawal of the claim. *Boone*, 28 BRBS at 122-124.

The facts in the instant case differ from those in *Boone*. In that case, the claimant filed a motion to withdraw his claim, which the district director accepted; thus, no claim was pending upon which a hearing could be held. In the instant case, however, claimant filed a claim in 1987, and has never taken any action on it; the claim remains pending and subject to the procedures set forth in the statute and regulations. Unlike the situation in *Boone*, claimant has not filed a motion to withdraw his claim.

Inasmuch as the district director's refusal to refer the claim for a formal hearing has denied employer its right to have the case referred for a hearing, we deny Director's motion to dismiss employer's appeal. Further, we hold that the district director committed error in failing to transfer the instant claim to the OALJ for a formal hearing upon employer's request for a hearing pursuant to Section 19(c). The case must be remanded for the district director to follow the procedures provided by the statute and regulations.

In reaching this decision, we note our disagreement with our dissenting colleague's view that the Board must dismiss this appeal. Our dissenting colleague argues that employer's appeal is a request for the Board to compel the district director to perform a specific act, and thus tantamount to a writ of mandamus pursuant to 28 U.S.C. §1361. That statute provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. §1361. We agree that the Board lacks authority to proceed under this statute. Our authority is based on Section 21(b)(3) of the Act, which authorizes the Board to hear appeals raising a substantial question of law or fact "from decisions with respect to claims of employees...." 33 U.S.C. §921(b)(3). Contrary to our dissenting colleague's statement, Section 21(b)(3) makes no reference to decisions of administrative law judges, and the Board's regulations permit any party-in-interest to appeal a decision of an administrative law judge or district director, *see* 20 C.F.R. §802.201. The Board accepts direct appeals of orders of the district director where the appeal raises a purely legal issue. *Brown v. Marine Terminals Corp.*, BRBS , BRB Nos. 95-0784, 95-1183 (Feb. 12, 1996)(*en banc*)(Brown and McGranery, JJ., dissenting). If any factual questions are at issue, a hearing must be held before an administrative law judge pursuant to Section 19(c). *Id.*

In this case employer's appeal raises a question of law regarding the rights of the parties with

[6]The court in *Chavez* noted that the traditional ripeness analysis consists of two prongs: the fitness of the issue for review and the hardship to the parties if review is withheld. The first prong of the test is determined by whether the issues are "purely legal" and "sufficiently developed factually," and the second prong is determined by whether there is a "direct and immediate hardship [which] would entail more than possible financial loss." *Chavez*, 961 F.2d at 1414-1415, 25 BRBS at 141-142 (CRT).

respect to a claim and the proper interpretation of the Act. The Board thus has subject matter jurisdiction over this purely legal issue, and it involves a fundamental right under the Act, the right of a party to a hearing before an administrative law judge. The decision in *Asbestos Health Claimants*, finding that jurisdiction in District Court under the Mandamus and Venue Statute was proper, does not affect the Board's authority to hear appeals raising questions of law, nor does it divest employer of its administrative remedies. For these reasons, we disagree with our colleague's statement that the Board's exercise of its statutory standard of review in this case is an exercise of mandamus authority. The issue regarding Section 19 raised in this case has previously been raised before the Board, and is resolved by our decision in *Black*. The discussion of Section 19 in *Asbestos Health Claimants* accords with the long-standing precedent set by *Black*, which should have been followed by the district director here. Finally, we note that the Board is also empowered by statute and regulation to remand any case for further action. 33 U.S.C. §921(b)(4); 20 C.F.R. §802.405(a). In so doing in this case, we do not compel a specific act by the district director; we hold only that he must act in accordance with Section 19.

In this regard, we note, as did the court in *Asbestos Health Claimants*, 17 F.3d at 135-136 n. 14, 28 BRBS at 17 n. 14 (CRT), that under Section 702.225 of the regulations, 20 C.F.R. §702.225,[7] claimant may withdraw his claim at any time without prejudice, subject to the time limitations contained in Section 13 of the Act. Pursuant to Section 13(b)(2) of the Act, 33 U.S.C.

[7]Section 702.225 permits a claimant to withdraw his claim prior to adjudication provided:

> (1) He files with the district director with whom the claim was filed a written request stating the reasons for the withdrawal;
>
> (2) The claimant is alive at the time his request for withdrawal is filed;
>
> (3) The district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and
>
> (4) The request for withdrawal is filed on or before the date the OWCP makes a determination on the claim.

20 C.F.R. §702.225(a); *see generally Henson v. Arcwel Corp.*, 27 BRBS 212 (1993); *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993). Section 702.225(c) describes the effect of a withdrawal as follows:

> Where a request for withdrawal of a claim is filed and such request for withdrawal is approved, such withdrawal shall be without prejudice to the filing of another claim, subject to the time limitation provisions of section 13 of the Act and of the regulations in this part.

20 C.F.R. §702.225(c).

§913(b)(2)(1988),[8] moreover, the time limitations for occupational disease cases do not begin to run until the claimant is actually disabled by the condition, or in the case of a voluntary retiree, until permanent impairment exists. *See Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993); *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989). If claimant does not yet suffer from any impairment, he would encounter no statute of limitation problems if he were to withdraw his claim and re-file at the time he becomes aware of an impairment.[9] We further note that if employer succeeds in having this claim adjudicated and claimant is found not disabled, his compensation entitlement will be $0. Under *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 2597, 26 BRBS 49, 53 (CRT)(1992), Section 33(g)(1) does not apply unless claimant's compensation exceeds his third-party recovery. *See Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd on recon. en banc*, BRBS , BRB No. 93-2227 (Jan. 25, 1996)(Brown and McGranery, JJ., concurring and dissenting); *see also Linton v. Container Stevedore Co.*, 28 BRBS 282 (1994).

Accordingly, based on the foregoing, we hold that the district director erred in failing to transfer the claim to the Office of Administrative Law Judges for a formal hearing upon employer's application, and we remand the case to the district director for further disposition consistent with this decision.

SO ORDERED.

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[8]Section 13(b)(2) provides:

> Notwithstanding the provisions of subsection (a) of this section, a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later.

33 U.S.C. §913(b)(2)(1988).

[9]Indeed, in *Asbestos Health Claimants*, the Fifth Circuit remanded the case to the district court for consideration of whether the district director should consider any motions for withdrawal prior to referring the case to the OALJ, noting that in view of the amended limitations period, withdrawal "would be an unsurprising choice, particularly for those who suffer no current disability and thus only made protective filings." *Asbestos Health Claimants*, 17 F.3d at 135 n.14, 28 BRBS at 17 n.14 (CRT).

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's determination to reject the Director's argument, advanced in her Motion to Dismiss Employer's Petition for Review, that employer lacks standing to appeal to the Board. I would, however, dismiss employer's appeal for lack of subject matter jurisdiction, because the Board has no authority to do what employer requests: first to review a decision of a district director and second, to mandamus the Director.

The Director moves to dismiss employer's petition for review, contending that employer lacks standing to appeal to the Board because it has not been "adversely affected or aggrieved" as required by 20 C.F.R. §802.201. This argument was expressly rejected by the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding Div., Litton Systems, Inc. v. White*, 681 F.2d 275, 284, 14 BRBS 988, 997 (5th Cir. 1982), when an employer sought to dismiss the Director's appeal, questioning the validity of a settlement which was satisfactory to both employer and claimant. The court observed that the statutory provision on standing to appeal to the Board requires no more than to be a "party in interest," 33 U.S.C. §921(b)(3), whereas the statutory provision on standing to appeal to the circuit courts from a Board decision requires that one be a "person adversely affected or aggrieved" by the Board's decision, 33 U.S.C. §921(c). The court held that "by using two distinct phrases - `parties in interest' and `persons adversely affected or aggrieved' - Congress reveals an intent to establish two distinct tests for standing to petition for review of administrative orders issued under the Act." *Id.*, 681 F.2d at 285, 14 BRBS at 997. The court reasoned that because Congress clearly provided different standing requirements for appeals to the Board from the requirements for appeals to the courts, the Secretary's regulation cannot be construed to add to the substantive meaning of the definition "party in interest," and thereby impose the requirements of judicial standing on parties who appeal to the Board. I believe that the logic of the court's decision is unassailable. Hence, I would reject the Director's argument that employer must be "adversely affected or aggrieved" to appeal to the Board and I would hold that employer has standing because it is undeniably a "party in interest." I would, however, grant the Director's Motion to Dismiss because the Board lacks subject matter jurisdiction.

Employer's request that the Board order the district director to refer the case to the Office of

Administrative Law Judges for a hearing is a plea for mandamus relief.[10] I believe that employer errs in assuming that the Board has jurisdiction to mandamus the district director and that the Board errs in holding that the authority it purports to exercise is other than the Writ of mandamus.[11] The majority treats the district director's denial of a request for a hearing as if it were a judicial decision. It is not. Prior to 1972, the district director had both the administrative duties and adjudicatory authority under the Longshore and Harbor Workers' Compensation Act. In 1972, however, Congress amended the Longshore Act and split the authority for these two functions. The district director retained authority for the administration of the statute. The adjudicatory authority over substantive legal or factual disputes was assigned to the Office of Administrative Law Judges, with review to the Board. *See* 33 U.S.C. §§919(a), 921(a)(3), (b)(4). Thus, the district director's refusal to refer the case for a hearing was an administrative decision.

[10]The Director does not address this issue in her brief.

[11]Black's Law Dictionary defines mandamus as "the name of a writ (formerly a high prerogative writ), which issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been legally deprived." BLACK'S LAW DICTIONARY 866 (5th ed. 1979).

The history of federal mandamus relief is set forth in Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory," Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308 (1967).

The Board's jurisdiction is clearly limited by statute in Longshore cases to appeals raising a substantial question of law or fact, from decisions of administrative law judges, which contain findings of fact and which are supported by a hearing record. 33 U.S.C. §921(b)(3).[12] The majority's assertion that the Board can review decisions of the district director because 33 U.S.C. §921(b)(3) does not specify decisions of administrative law judges is disingenuous because that section refers explicitly to "the findings of fact in the decision under review" and the "hearing record," terms which have application to administrative law judge decisions, but not to district director decisions. Likewise, the Board's authority to remand a case is limited by statute to the Office of Administrative Law Judges; it cannot reach beyond that office to the district director. 33 U.S.C. §921(b)(4).

The Board's limited jurisdiction reflects Congress' intent to separate the adjudicatory authority from the administrative and to assign to the Board a purely adjudicatory responsibility, review of decisions of administrative law judges. Yet, over the years, the Board has persisted in exercising jurisdiction over decisions of district directors, despite its inability to find supporting authority in the statute, regulations or caselaw. In fact, the three circuit courts which have considered the issue have overruled the Board. *See Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981); *see also Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BRBS 2-328 (6th Cir. 1989).[13] The case at bar demonstrates the kind of mischief which the Board can get into when it fails to recognize the limits of its power.

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[12]33 U.S.C. §921(b) provides in pertinent part:

> (3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.
>
> (4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action.

[13]The Board's erroneous exercise of jurisdiction over decisions of district directors is discussed fully in the dissenting opinion in *Brown v. Marine Terminals Corp.*, BRBS , BRB Nos. 95-0784, 95-1183 (Feb. 12, 1996)(*en banc*)(Brown and McGranery, JJ., dissenting).

The majority maintains that its decision holding that the district director has a statutory duty to refer a case for a hearing at the request of a party and remanding the case to the district director to dispose of the case consistent with its decision, is not an action in the nature of mandamus to the district director. The majority relies upon *Ingalls Shipbuilding v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT)(5th Cir. 1994), not for its holding on jurisdiction under the Mandamus and Venue Act, but for the guidance it provides in its construction of Section 19 of the Longshore Act. In *Asbestos Health Claimants*, the Fifth Circuit held that the district director had a "clear, ministerial and nondiscretionary duty pursuant to 33 U.S.C. §919(e) to transfer the claims in issue to the Office of Administrative Law Judges for a hearing." 17 F.3d at 134, 28 BRBS at 16 (CRT). Although *Asbestos Health Claimants* supports the majority's contention that the district director's refusal of employer's request was erroneous, it also makes clear that this decision is purely administrative, and that "mandamus was the proper remedy to redress the Director's failure to carry out this duty." *Id.*

Of course, the majority does not cite *Asbestos Health Claimants* for its holding, that the district court had jurisdiction pursuant to the Mandamus and Venue Act of 1962[14] to redress the district director's refusal to refer a case for a hearing, because the majority acknowledges that the Act does not extend its authority to the Board. In that statute, Congress expressly conferred upon the district courts original jurisdiction of actions to compel federal employees to perform a ministerial duty. The majority, however, cannot intelligibly bifurcate the subject matter and jurisdictional issues in the Fifth Circuit's decision. Once it is established that the gravaman of the complaint is the district director's failure to perform a ministerial duty, the only remedy is mandamus. The majority's attempt to disguise its decision in terms appropriate to review of a judicial decision fails when these terms are applied to the facts of the case: the district director has violated his statutory duty to refer the case for a hearing; he is ordered to do so. That is a mandamus.

[14]28 U.S.C. §1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The majority contends that from 33 U.S.C. §921(b)(3) and 20 C.F.R. §802.405(a),[15] it derives the authority necessary to correct the district director's erroneous denial of a hearing. Essentially, the majority purports to find mandamus authority in its jurisdictional authorization to hear appeals from decisions raising a substantial question of law or fact. 33 U.S.C. §921(b)(3).

The All Writs Act, 28 U.S.C. §1661(a), belies this contention.[16] In that statute Congress granted to all courts it has created, authority, *inter alia*, to issue the Writ of Mandamus in aid of their jurisdiction. Needless to say, the Board is not a court. *See Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983), *cert. denied*, 462 U.S. 1119, *reh'g denied*, 463 U.S. 1236 (1983). The All Writs Act demonstrates that mandamus authority cannot be presumed, but must be specifically conferred by Congress. There is no such authority in the Longshore Act. Hence, since Congress has not expressly empowered the Board to issue an order in the nature of mandamus, the Board has no authority to do so.

Furthermore, in *Asbestos Health Claimants,* the Fifth Circuit determined that it was without authority to mandamus the district director, because its power to mandamus is derived from the All Writs Act, which authorizes issuance of the Writ only where the court otherwise has jurisdiction. The court reasoned that since its jurisdiction under the Longshore Act is confined to review of the Board's decisions, it was without jurisdiction to mandamus the district director. *Asbestos Health Claimants*, 17 F.3d at 133, 28 BRBS at 14 (CRT). The Fifth Circuit's analysis of the limitations of its jurisdiction underscores another reason that 33 U.S.C. §921(b)(3), (4) and 20 C.F.R. §802.405(a) cannot authorize the Board to mandamus the district director, although the regulation provides that the Board is empowered, when remanding a case, to direct that additional proceedings be initiated or other action be taken. Because Congress has restricted the Board's authority to remand of a case to the administrative law judge, 33 U.S.C. §921(b)(4), the regulation cannot enlarge the Board's jurisdiction to encompass the district director. It is axiomatic that "the Secretary's power to promulgate rules and regulations to implement the LHWCA does not include the power to modify the clear mandate of a statute." *Insurance Co. of North America v. Gee*, 702 F.2d 411, 414, 15 BRBS 107, 112 (CRT) (2d Cir. 1983). *Accord, Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240, 245, 10 BLR 2-322, 2-326 (11th Cir. 1987). Thus, the Board is not empowered to order the district director to refer the case for a hearing.

Employer has applied to the wrong forum for relief. The remedy it seeks is only available in

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[15]20 C.F.R. §802.405(a) provides in pertinent part:

> Where a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board.

[16]28 U.S.C. §1651 provides in relevant part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

the district court. 28 U.S.C. §1361; *Asbestos Health Claimants, supra*. Although when the Board was created, it assumed responsibility for review of administrative law judge decisions, which was formerly vested in the district courts, 33 U.S.C. §921(b)(4), the Board did not receive all of the powers of the district court. The United States Court of Appeals for the District of Columbia Circuit made plain in *Kalaris*, that a broad reading of the Board's jurisdictional grant, like that advanced by the majority in the case at bar, is absolutely wrong:

> The Board possesses only limited powers to issue compensation orders and it must resort to an appropriate District Court to have its orders enforced. *Id.* §§921(b)(3), 921(d). The Board's narrow jurisdictional grant extends only `to claims of employees [under the Act],' and not to all potentially related matters. *Id.* §921(b)(3). It plays only a limited role in reviewing administrative law judge determinations and obviously does not exercise all of the jurisdiction usually conferred on District Courts.

Kalaris, 687 F.2d at 385. The district director's refusal to refer the case for a hearing is one of "those potentially related matters" which exceeds the Board's narrow jurisdictional grant.

The majority's decision exceeds the Board's jurisdiction because the Board has no authority to review orders of the district director, no authority to provide mandamus relief and no authority to remand a case to a district director. Accordingly, I would dismiss employer's appeal for lack of jurisdiction.

REGINA C. McGRANERY
Administrative Appeals Judge