SECTION 18

Digests

Section 18(a)

When employer unilaterally terminates compensation payments payable pursuant to an award because it believes that a Section 33(g) bar is applicable, claimant's remedy is to seek a default order pursuant to Section 18(a). Shoemaker v. Schiavone and Sons, Inc., 20 BRBS 214 (1988).

The Board holds that a letter from the Associate Director, OWCP, to claimant, postponing the date on which the Special Fund was to assume liability for paying awarded compensation pursuant to Section 8(f), constituted a final decision which was appealable to the Board under Section 21(b)(3) of the Act. The letter was of no legal effect, however, since the Associate Director possessed no authority under Section 18 to unilaterally determine that no default would be declared and to decide that the date on which the administrative law judge had ordered the Special Fund to commence payments should be postponed. Since the Director did not participate before the administrative law judge, he cannot obtain a new hearing on the issue of a credit by using Section 18. Maria v. Del Monte/Southern Stevedore, 21 BRBS 16 (1988)(McGranery, J., dissenting), vacated on reconsideration en banc, 22 BRBS 132 (1989).

The Board vacates Maria, 21 BRBS 16, holding that the letter was not an attempted modification of the administrative law judge's Decision and Order (and thus not a final appealable action) but, rather, a notification to claimant that the Fund was suspending compensation until a statutory credit was recouped. The associate director's actions in withholding compensation were similar to those of employer in Shoemaker, 20 BRBS 214 (1988). The Director may take the same action as an employer, taking the risk that the suspension of benefits may be unjustified and that the Fund may be liable under Section 18. Claimant's remedy in cases involving a unilateral termination of compensation is to seek a default order pursuant to Section 18. Maria v. Del Monte/Southern Stevedore, 22 BRBS 132 (1989), vacating on reconsideration, 21 BRBS 16 (1988).

The regulation accompanying Section 18(a), 20 C.F.R. §702.371, provides that when a deputy commissioner receives an application for a supplemental default order, he shall institute proceedings as if the claim were an original claim, and may, if appropriate, transfer the case to the administrative law judge. As this case was transferred to the administrative law judge pursuant to Section 18(a) solely for a determination as to whether disputed medical expenses should be paid, the administrative law judge exceeded the scope of his authority in raising the issue of D.C. Act jurisdiction sua sponte. Kelley v. Bureau of National Affairs, 20 BRBS 169 (1988).

Rucker v. Lawrence Mangum & Sons, Inc., 18 BRBS 74 (1986) is reversed by the D.C. Circuit in an unpublished decision on other grounds, 830 F.2d 1188 (D.C. Cir. 1987)(table) see p. 18-2.

Section 18(a) requires that a deputy commissioner's order regarding an employer's default be enforced by a district court. The Board, however, retains jurisdiction in cases involving only a question of law regarding the propriety of a Section 14(f) penalty and not requiring enforcement of the penalty under Section 18. Section 18 makes no provisions for district court review of deputy commissioner's order denying Section 14(f) compensation where no default order has been issued. Durham v. Embassy Dairy, 19 BRBS 105 (1986).

The Board held that it had jurisdiction to decide whether employer was liable for a Section 14(f) penalty. Although Section 18(a) states that a default on the part of employer is enforceable in federal district court, the Board retains jurisdiction of cases which involve only questions of law regarding the propriety of a Section 14(f) penalty, and which do not require enforcement of default orders. Since no default order had been issued in this case, the Board addressed claimant's Section 14(f) argument. Lynn v. Comet Construction Co., 20 BRBS 72 (1986).

The Board holds that where employer has paid compensation and the Section 14(f) penalty, there is no basis for district court enforcement proceedings under Section 18(a), and the Board retains jurisdiction over the issue of the propriety of the Section 14(f) penalty. The Board rejects the notion that employer must subject itself to enforcement proceedings in district court in order to challenge the propriety of the Section 14(f) penalty. By paying the penalty and then appealing to the Board, claimant immediately receives the additional amounts allegedly owed to him and employer maintains its right to press its legal argument. Section 18(a) applies only in the event of non-payment of compensation or penalty, and there is no statutory basis for payment and a challenge in the district court. Jennings v. Sea-Land Service, Inc., 23 BRBS 12 (1989), vacated on other grounds on recon., 23 BRBS 312 (1990).

The Board rejects the Director's argument that the Board lacks jurisdiction over this case, holding that the Board retains jurisdiction in cases involving the propriety of the deputy commissioner's award of a Section 14(f) penalty and not requiring Section 18 enforcement of the penalty. McCrady v. Stevedoring Services of America, 23 BRBS 106 (1989).

The Seventh Circuit upholds the constitutionality of Section 18(a), which provides for the entry of a supplemental default order without an additional hearing where an employer fails to pay a compensation award within 30 days. *Schmit v. ITT Federal Electric International*, 966 F.2d 1103, 26 BRBS 166 (CRT) (7th Cir. 1993).

The Fifth Circuit held that Rule 4 of the Federal Rules of Civil Procedure, pertaining to service of documents, was inapplicable to procedures to be used in obtaining and enforcing a supplementary order of default under Section 18(a) of the Act, as engrafting Rule 4 onto Section 18(a) procedures would frustrate Congress' intent to promptly compensate injured workers. The court also indicated that the procedures used did not violate employer's due process rights. *Jourdan v. Equitable Equipment Co.*, 889 F.2d 637, 23 BRBS 9 (CRT)(5th Cir. 1989).

In distinguishing Section 21(d) from Section 18(a), the court noted that Section 18(a) requires an employer to receive administrative notice and an opportunity to be heard prior to enforcement, and it concluded that the specified procedure arguably preempts application of Rule 4 of the FRCP to Section 18(a). *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142 (CRT) (1st Cir. 1993).

The Fifth Circuit held that in Section 18(a) enforcement proceedings, the party liable for benefits may not obtain review of the underlying compensation order in the district court but must seek review before the Board. The district court's scope of review is limited to the lawfulness of the supplemental default order. *Abbott v. Louisiana Insurance Guaranty Association*, 889 F.2d 626, 23 BRBS 3 (CRT) (5th Cir. 1989).

The Fifth Circuit held that the absence of LIGA's participation at an initial, pre-enforcement check (*i.e.*, a hearing) does not violate the due process rights of the aggrieved party because the Board's power to stay compensation awards in order to prevent irreparable injury assures the party of meaningful, post-deprivation (pre-enforcement) review. *Abbott v. Louisiana Insurance Guaranty Association*, 889 F.2d 626, 23 BRBS 3 (CRT)(5th Cir. 1989).

The Fifth Circuit rejects LIGA's assertion that it was deprived of due process, noting that LIGA fully participated in the pre-deprivation hearing before the administrative law judge. The court therefore affirmed the district court's enforcement of the award. *Bunol v. George Engine Co.,* 996 F.2d 67, 27 BRBS 77 (CRT) (5th Cir. 1993).

The Fifth Circuit held that where employer did not raise the issue of responsible carrier in the proceedings before the administrative law judge, the issue could not be raised before the Court in enforcement proceedings. *Jourdan v. Equitable Equipment Co.,* 889 F.2d 637, 23 BRBS 9 (CRT)(5th Cir. 1989).

The Fifth Circuit held that employer may not raise the issue of the reasonableness of claimant's medical expenses in an enforcement proceedings but should raise it as a substantive matter before the administrative law judge. *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 25 BRBS 145 (CRT)(5th Cir. 1992).

The Fifth Circuit held that where the administrative law judge's compensation order provided that employer was to receive a credit for wages paid but did not specify the amount of the credit or provide a method of computation based on facts in the record, the order was not a "final decision" which was "due" and "effective," and employer's failure to pay compensation under the decision accordingly did not subject it to Section 14(f) liability. Thus, the district court properly declined to enforce a default order issued by the deputy commissioner, pursuant to Section 18(a) of the Act, requiring employer to pay a Section 14(f) penalty. *Severin v. Exxon Corp.,* 910 F.2d 286, 24 BRBS 21 (CRT)(5th Cir. 1990).

The Fifth Circuit held that medical benefits are included in "compensation" for purposes of enforcement proceedings under Section 18(a). The court therefore held that the district court erred in dismissing claimant's petition for enforcement of the deputy commissioner's supplementary order compelling employer to pay claimant's medical expenses on the ground that medical expenses are not included in compensation. Nonetheless the court affirmed the district court's dismissal of claimant's petition, on the ground that the administrative law judge's underlying compensation order was not final and enforceable since it did not specify the amount of the medical expenses to be awarded and the method for calculating them. The court also held that the deputy commissioner further compounded this error by issuing the supplementary order without resolving the amount of medical expenses that was at issue in an informal conference and by simply accepting the amount claimant asserted was in default. *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 25 BRBS 145 (CRT)(5th Cir. 1992).

The Fifth Circuit distinguished the case from *Severin*, noting that although the administrative law judge seemingly awarded overlapping periods of temporary total and permanent partial disability, this was merely a clerical error which the deputy commissioner corrected in the supplemental default order. The award thus became final and enforceable under the terms of *Severin*. *Bunol v. George Engine Co.,* 996 F.2d 67, 27 BRBS 77 (CRT) (5th Cir. 1993).

The Fifth Circuit holds, consistent with *Severin*, that an administrative law judge's decision does not become final and enforceable until the deputy commissioner furnishes the calculations directed by the decision. That fact that employer could have made the calculations on its own is not determinative in this case in view of the specific directive that the deputy commissioner make the calculations. Thus, the district court properly declined to enforce the assessment of a Section 14(f) penalty for late payment. *Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110 (CRT) (5th Cir. 1994).

The Eleventh Circuit holds that in an enforcement proceeding under Section 18(a), the district court has the authority to determine the lawfulness of the default order, *i.e.,* whether employer paid the compensation due within the 10-day time frame of Section 14(f). *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998).

In affirming the assessment of a Section 14(f) penalty, the district court holds that the district director undertook the necessary "investigation" of the claim as required under Section 18. Moreover, as employer had actual notice of the claim for the supplementary default order from claimant's counsel, the district director's failure to give employer did notice did not prejudice its rights. *Zea v. West State, Inc.*, 61 F.Supp.2d 1144 (D.Ore. 1999).

The Board discussed the regulation at 20 C.F.R. §702.372 in relation to the enforcement of a Section 14(f) penalty assessment. It determined that this regulation, which allows for a hearing, applies only when there is no agreement on the amount of the compensation due under the initial compensation order. If a factual matter is raised regarding the compensation due which must be resolved before the district director can issue a default order, the case is properly decided by an administrative law judge. In this case, the dispute centered on the propriety of the Section 14(f) penalty itself, as employer alleged its payment was not made in 10 days due to claimant's concealing his correct address. The Board affirms the administrative law judge's dismissal of the claim, as there is no dispute with the original compensation order or the amount in default. Under these circumstances, sole authority rests with the district court, pursuant to Section 18, to determine whether the default order was issued in accordance with law, and employer may raise its defenses when claimant seeks enforcement of the default order in district court. *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000).

The D.C. Circuit held that the Board does not have jurisdiction to address a supplementary compensation order declaring payments in default issued pursuant to Section 18(a) of the Act. Specifically, in this case, the OWCP issued a supplementary compensation order finding employer/carrier in violation for failure to make payments of benefits pursuant to *Brandt/Holliday*, and it awarded claimant a Section 14(f) penalty of 20% of the shortfall. Because employer/carrier raised the issue of whether claimant's benefits were subject to cost-of-living adjustments under Section 10(f) pursuant to *Brandt/Holliday*, and because this issue had not been addressed previously, the Board took the position that the Section 10(f) payments were not the subject of a compensation order and were properly before it for the first time; following *Bailey*, 32 BRBS 76 (1998), the Board held that prospective benefits are not subject to Section 10(f) adjustments. The court vacated the Board's order, holding that employer did not timely challenge the Section 10(f) issue, and that the Board lacks jurisdiction to address issues raised in a default order. *Snowden v. Director, OWCP*, 253 F.3d 725, 35 BRBS 81(CRT) (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 1988 (2002).

The Ninth Circuit holds that the Section 14(f) penalty is mandatory and self-executing; the statute does not allow consideration of equitable factors, though the court reserved judgment on a case presenting fraud or physical impossibility. The use of the mandatory term “shall” in Section 14(f) requires the district director to add the 20 percent penalty if he finds more than ten days has elapsed between the date the amount became due and the date it was received. Thus, the court stated that after the district director makes a factual determination that a penalty is due and owing, and issues a supplemental order of default, Section 18(a), which confers enforcement jurisdiction on the district court, provides that the district court’s inquiry is solely whether the supplemental order of default is in accordance with law. Therefore, the court of appeals reversed the district court’s holding which equitably estopped claimant from raising the Section 14(f) penalty, in the enforcement proceeding before it, where claimant received his compensation late because employer sent the check to an incorrect address provided by claimant. *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 36 BRBS 63(CRT)(9th Cir. 2002).

The district court grants enforcement of the administrative law judge’s award of compensation benefits as a sum certain was awarded. The court denied enforcement of the award of future medical benefits and interest, however, as the administrative law judge’s order did not specify any amount owed for these items. The court remanded the case to the district director to make any determinations as to whether amounts are owed on these claims. *Cohen v. Pragma Corp*., 445 F.Supp.2d 15 (D.D.C. 2006).

Section 18(b)

Section 18(b) of the Act fails to provide authority for mandating that the Special Fund pay a compensation award where a claimant's employer's insurance company has been adjudicated insolvent. Such payments may be made in the Secretary's discretion. In any event, the issue of whether the Special Fund could potentially pay a claimant's benefits in such a situation cannot even be considered unless an order indicating the amount of the employer's default in payments has been obtained from a U.S. District Court. See 33 U.S.C. §918(a). No such order was obtained in this case. Accordingly, given these considerations, the Board declined to hold the Special Fund responsible for paying the compensation awarded in this case. Meagher v. B.S. Costello, Inc., 20 BRBS 151 (1987), aff'd, 867 F.2d 722, 22 BRBS 24 (CRT)(1st Cir. 1989).

U.S. Court of Appeals for the First Circuit affirms Board's holding that an employer is liable for actually paying a claimant's benefits if its insurance carrier becomes insolvent, under Section 4(a), and that this liability cannot be judicially shifted to the Special Fund under Sections 18 and 44(c). Moreover, the Fund can only be liable if employer is unable to satisfy a district court default judgment, which was not obtained in this case. B.S. Costello, Inc. v. Meagher, 867 F.2d 722, 22 BRBS 24 (CRT)(1st Cir. 1989), aff'g 20 BRBS 151 (1987).

The Special Fund may be liable for medical benefits where employer defaults or is insolvent. Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987).

Where employer is insolvent and employer's carrier is not liable under the Act because it was not employer's longshore carrier, the Secretary of Labor, in her discretion, may satisfy the judgment from the Special Fund under Section 18(b). Shaller v. Cramp Shipbuilding and Dry Dock Co., 23 BRBS 140 (1989).

Where claimant is unable to collect benefits from the employer found liable, due to the employer's bankruptcy, claimant should contact the Director, Office of Workers' Compensation Programs, with regard to payment of benefits, as the Director may, in his or her discretion, satisfy the judgment from the Special Fund. *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991).

The Board declined to modify or void its previous decision holding employer, and not either carrier, liable for benefits on the basis of the employer's discharge in bankruptcy. Enforceability of a decision is not a matter for the Board's review. Rather, Section 18(b) provides for the contingency that the liable employer is insolvent. Specifically, under that section, claimant may be able to obtain benefits from the Special Fund at the discretion of the Secretary. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).