BRB No. 13-0476

ETHEL L. RICHARDSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED	)	DATE ISSUED: May 22, 2014
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Order Approving Settlement of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

L. O'Neal Williams, Jr., and Cory M. Williams (Williams, Williams & Montgomery, P.A.), Hattiesburg, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals

the Order Approving Settlement (2013-LHC-01317) of Administrative Law Judge Patrick M. Rosenow 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 review the administrative law judge's approval of a settlement under an abuse of discretion standard. *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988).

Claimant, who had worked as a welder for employer for over 20 years, sustained a left shoulder injury at work on July 12, 2010, when she tripped and fell. Claimant was diagnosed with an acute rotator cuff tear and underwent surgery on July 29, 2010; employer paid claimant temporary total and permanent partial disability benefits as well as medical benefits. Claimant returned to light-duty work for employer on September 15, 2010, and employer terminated temporary total disability payments. In January 2011, employer no longer had modified work to offer claimant, and it resumed temporary total disability payments. In light of claimant's work restrictions, she was unable to return to her usual work as a welder. In April 2011, employer's vocational expert identified three potential jobs for claimant with wages ranging between $7.25 and $8 per hour, and, effective April 21, 2011, employer began paying claimant permanent partial disability benefits based on a residual wage-earning capacity of $300 per week ($7.50 per hour). When she began working for $8 per hour, employer reduced its disability payments accordingly. Claimant later changed jobs and was paid $7.35 per hour. After negotiations, the parties reached an agreement to settle claimant's claim, and they submitted their settlement application to the district director in April 2013.

The district director found that the lump sum settlement amount of $140,000 for disability compensation was inadequate because, applying an eight percent discount rate to the compensation rate of $538.68 that employer was paying, the present value of claimant's periodic payments was $306,000. The district director also stated that the parties failed to explain how the agreed-upon amount was adequate pursuant to Section 702.242(b)(6), 20 C.F.R. §702.242(b)(6). The parties requested a hearing before the administrative law judge and resubmitted their settlement application,[1] with an increase of $500 in the settlement amount. The administrative law judge, after considering the parties' settlement application, as well as letters from the parties and the Director, stated he would not second-guess claimant and her attorney, found the settlement amount of $140,500 adequate and not procured by duress, and approved it. Order at 5-6.[2] The

[1] This is an appropriate action under Section 8(i)(2) and Section 702.243(c). 33 U.S.C. §908(i)(2); 20 C.F.R. §702.243(c).

[2] The Order was filed by the district director on June 25, 2013. Employer paid claimant the settlement proceeds within the allotted 10-day period. 33 U.S.C. §914(f).

Director appeals the approval of the settlement. Claimant and employer respond, separately, urging affirmance. The Director replies.

The Director contends the administrative law judge erred in approving the parties' settlement, asserting he erred in deferring to claimant's counsel and in relying on the statute's automatic approval provision rather than independently assessing the settlement's adequacy. The Director also argues that the administrative law judge did not have sufficient evidence on which to find the criteria for determining adequacy had been satisfied and that he failed to perform an actuarial analysis to arrive at a starting point for assessing the adequacy of the settlement, as required by *Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT).[3] Claimant and employer respond, asserting that claimant's claim was not undisputed, that they considered all the factors regarding the risks of litigation, and that they submitted a complete settlement application which not only addressed the adequacy of the settlement amount, but which is, in fact, adequate. We affirm the administrative law judge's Order approving the parties' settlement agreement.

Section 8(i), 33 U.S.C. §908(i), provides for the settlement of "any claim for compensation under this chapter."[4] It explicitly states that the district director or the administrative law judge "shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress." 33 U.S.C. §908(i)(1).[5] If the parties are

[3] In this regard, the Director agrees with the district director's assessment that a settlement of $140,000 is not adequate because claimant's claim is worth over $300,000, given her life expectancy of 29 years, her weekly compensation rate of over $500, and application of an eight percent discount rate. The parties' settlement also called for $10,000 for future medical benefits and a maximum of $10,000 for an attorney's fee; the Director does not challenge the latter two provisions.

[4] Section 8(i) is the only means for compromising an employer's obligation to pay benefits under the Act, creating an exception to Section 15(b), 33 U.S.C. §915(b) ("No agreement by an employee to waive his right to compensation under this chapter shall be valid"), and to Section 16, 33 U.S.C. §916 (no assignment, release, or commutation of compensation and benefits is valid except as provided in the Act).

[5] Section 8(i)(1) provides in full:

> Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or

represented by counsel, "the settlement shall be deemed approved unless specifically disapproved within thirty days." 20 C.F.R. §702.243(b); *see also* 33 U.S.C. §908(i). Once approved, the effect of a settlement is to completely discharge the employer's liability for the claimant's injury. 33 U.S.C. §908(i)(3). The regulations ensure that the approving official has the information necessary to determine whether the settlement is inadequate or procured by duress. *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991); 20 C.F.R. 702.241-702.243.[6]

The application submitted by the parties to the administrative law judge in this case explained:

> The *parties believe this settlement is adequate* inasmuch as claimant had obtained employment. There is also proof that claimant could earn higher wages than that which she is currently earning. Furthermore, the Employer contends that claimant did not give a maximum effort in her recovery or on the functional capacities evaluation and it is the Employer's contention that claimant's restrictions may not be as severe had she given a better effort. The Employer may have been able to return her to work. Claimant disagrees and the parties reached this settlement to resolve these issues.

> death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

[6] Section 702.242(a) requires the settlement application: to be in the form of a stipulation signed by all parties; to be self-sufficient; and to contain a brief summary of the facts of the case including a description of the incident, a description of the nature of the injury including the degree of impairment and/or disability, a description of the medical care rendered to date of settlement, and a summary of compensation paid. 20 C.F.R. §702.242(a). Section 702.242(b) requires that the application contain, *inter alia*, the reasons for the settlement and its terms, the issues in dispute, information on whether or not the claimant is working or is capable of working, and a "statement explaining how the settlement amount is considered adequate." 20 C.F.R. §702.242(b).

Settlement App. at 3 (emphasis added). After discussing the amount of benefits that had already been paid to claimant[7] and employer's agreement to pay a lump sum of $140,500 as compensation for claimant's injury, and after noting that no further medical treatment is recommended, claimant and employer agreed:

> 11. *That this settlement meets the requirements of the Act, as it was not procured by duress, is adequate,* and, further, though not a requisite of the Act, is fair and reasonable, for a proper purpose, and is based upon Claimant's mature deliberation. Oceanic Butler, Inc. v. Nordahl, 842 F.2d 773 (5th Cir. 1988).
>
> 12. Several issues exist between the parties, including, but not limited to, the nature and extent of disability, loss of wage earning capacity, penalties, interest, and whether or not an attorney's fee is to be awarded, and if so, if it is the responsibility of the Employer or a lien on benefits to which the Clamant may be entitled, if any.
>
> 13. That Claimant, rather than presenting these issues and evidence to an Administrative Law Judge, Benefits Review Board, or Fifth Circuit Court of Appeals, and risk the possibility of an adverse decision at any judicial level on any of the aforementioned issues, or receive an order awarding weekly benefits over an extended period of time, demands a lump sum be paid in settlement of this claim to which the employer acquiesces. Claimant understands that she may present proof and evidence that is more persuasive than the proof of Employer herein and cause one of the aforementioned judicial bodies to resolve some of the issues in her favor which would result in payment of weekly benefits, and further understands that an adverse decision could be issued by any of the judicial bodies; notwithstanding that possibility, Claimant urges a single lump sum payment to be approved, *averring emphatically the aforesaid lump sum payment to be in her best interest.*

Settlement App. at 5-6 (emphasis added).

In his Order, the administrative law judge set forth the appropriate law, the settlement terms, the Director's objection to the settlement, and the private parties'

[7] Employer had previously paid a total of $71,973.78 in temporary total and permanent partial disability benefits and $25,983.13 for medical expenses. Settlement App. at 3-4.

position in response.[8] At the outset of his discussion, the administrative law judge noted claimant's assertion that "she has been advised by her counsel and understands the risks and rewards of taking her case to a full hearing . . . versus accepting an immediate, albeit significantly discounted, lump sum payment." Order at 2-4. Because the parties agreed to their settlement, the administrative law judge posited that the issue before him "involves the statutory role of the Department in administering claims under the Act and the tension between the paternalistic role taken by the Department and the normal assumption that counsel advising claimants are competent and ethical." *Id.* at 4. In approving the settlement, the administrative law judge rejected the "second-guessing" position the Director assumed.

Specifically, the administrative law judge stated that a distinction must be made between a claimant who has counsel and one who does not, concluding that second-guessing one who has counsel implies that counsel is not competent to represent the claimant. He concluded that the reviewer of the settlement agreement should apply an abuse of discretion standard, as *de novo* review would give the "second-guesser" veto power over the choices the claimant and her attorney made in deciding what is in the claimant's best interest. The administrative law judge acknowledged that, although the settlement agreement is to be self-sufficient, in reality, the reviewer of a settlement likely would not have as much insight as the parties into the reasons for the settlement because the claimant may not be willing to document all her reasons. Thus, the administrative law judge concluded that the settlement application in this case contains sufficient information to determine that the amount is adequate and that the agreement was not procured under duress, and that claimant need not explain the details of her "assessment why she thinks she might lose her case." Order at 6. Additionally, the administrative law judge stated that giving a value to litigation risk is "extremely subjective," and that those in the best position to make such an assessment are claimant and her counsel. *Id*. Thus, the administrative law judge concluded:

> I believe that even in its paternalistic context, the Act does afford a presumption of effective assistance of counsel. If it were not so, an application by a represented claimant would not be automatically approved 30 days after submission. Claimant's application appears to me to be knowing, intelligent, and voluntary; it was submitted on the advice of counsel after reflection and consideration of the risks of litigation and her personal circumstances. It does not appear to be a consequence of any duress. Based on the representation of Claimant and her counsel I find that the proposed settlement is fair and adequate.

[8] Employer, on behalf of claimant and itself, responded to the Director's objections to the settlement.

Id. Thus, the administrative law judge approved the parties' Section 8(i) settlement for $140,500 in compensation and $10,000 for medical benefits.

The Director urges the Board to reverse the administrative law judge's order approving the parties' settlement, contending the settlement is inadequate for various reasons. Because he relies on aspects of the decision of the United States Court of Appeals for the Fifth Circuit in *Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT), to support his position, we shall review the facts and holding in that case.

In *Nordahl*, the parties reached a settlement for $75,000 to resolve a disputed claim for total disability.[9] The claimant died one week after the signed settlement application was submitted to the district director. Following the claimant's death, the carrier indicated its intent to withdraw from the agreement. The district director did not permit the carrier to withdraw, and she approved the parties' settlement. The issue before the Board and the Fifth Circuit was whether the carrier had the right to rescind its agreement where the claimant died before administrative approval of the settlement. The Board held, and the court affirmed, that the period between the agreement and the approval could not be treated as a grace period during which an insurer could re-think its position. Thus, the court held, as a matter of policy, that employers/insurers are to be held to their bargains and cannot rescind an executed settlement agreement that had been submitted for administrative approval absent the express contractual right to do so. *Nordahl*, 842 F.2d at 780-782, 21 BRBS at 39-41(CRT); *but see Rogers v. Hawaii Stevedores, Inc.*, 37 BRBS 33 (2003) (the claimant was permitted to withdraw from a signed settlement prior to its approval); *Towe v. Ingalls Shipbuilding, Inc.*, 34 BRBS 102 (2000) (disapproval of a settlement obviates the employer's performance of its contractual promise, making it permissible to void the contract). The court reviewed the approval of the settlement for an abuse of discretion and found that the elements necessary for adequacy were "examined and passed" Board review. *Nordahl*, 842 F.2d at 780-782, 21 BRBS at 39-41(CRT); *see also Nordahl*, 20 BRBS at 22. Specifically, the Fifth Circuit agreed with the Board that the settlement was a compromise between the parties over the dispute of the nature and extent of disability, whether the claimant could return to work, and the probability of litigation success, and the parties had stated there was no dispute over the adequacy of the agreement at the time it was executed. *Nordahl*, 842 F.2d at 782-783, 21 BRBS at 41(CRT); *Nordahl*, 20 BRBS at 22. As there was no evidence of duress, and as the claimant's early death "allegedly" proved adequacy of the amount agreed to, the court held there was nothing to warrant denying the settlement

[9] Neither the claimant nor the carrier was represented by counsel. *Nordahl v. Oceanic Butler, Inc.*, 20 BRBS 18, 19 (1987), *aff'd*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988).

application; thus, the district director "had to find that the agreement comported with section 8(i)(1)." *Id.*, 842 F.2d at 783, 21 BRBS at 41(CRT).

In this case, the Director asserts that the administrative law judge erred in deferring to the parties' assessment of the settlement's adequacy rather than drawing his own conclusions independently. The Director relies on the following language from *Nordahl*, 842 F.2d at 781, 21 BRBS at 40(CRT) (emphasis added), to support his assertion that the administrative law judge must conduct an independent review of the settlement amount regardless of claimant's representation by counsel:

> The unambiguous purpose of allowing claimants to withdraw from submitted, but unapproved, settlements and of the approval requirement itself, nonetheless, clearly is protection of the claimants', and the public's, interest in preserving them and their families from destitution and consequent reliance on the taxpaying public. That interest is not left for the employee alone to protect: *The Act's administrators have the statutory responsibility of second-guessing the claimant (even if represented by counsel) on whether the lump-sum payment will likely prove "inadequate," under the current standard*, or whether it is "for the [employee's] best interests," under the former version of section 8(i).

However, Section 702.243(b) of the regulation provides:

> The adjudicator shall consider the settlement application within thirty days and either approve or disapprove the application. The liability of an employer/insurance carrier is not discharged until the settlement is specifically approved by a compensation order issued by the adjudicator. However, *if the parties are represented by counsel, the settlement shall be deemed approved* unless specifically disapproved within thirty days after receipt of a complete application.

20 C.F.R. §702.243(b) (emphasis added); *see also* 33 U.S.C. §908(i)(1). The administrative law judge stated that the provision in the statute and the regulation which deems a counsel-negotiated settlement "approved" effectively includes a presumption that counsel is competent and ethical. The administrative law judge further stated that claimant and her counsel were in the best position to assess her risks of litigation. Thus, in view of the automatic approval provision, the administrative law judge held that claimant, who entered into a settlement with the advice of counsel, is not required to substantiate the reasons stated for the compromise with the same specificity as might be required of an unrepresented claimant. Order at 5-6.

The Director argues that an administrative law judge may not distinguish between settlements by claimants without legal representation and those with legal representation in determining the amount of specific information necessary to be disclosed in order to demonstrate the adequacy of the settlement. The Director avers that the adjudicator's role in determining adequacy is not diminished when a claimant is represented by counsel. We reject this contention as the Director has not shown that the administrative law judge's interpretation is unreasonable. The administrative law judge held that in determining the adequacy of a settlement, general assertions may be sufficient to justify accepting a significant discount from the judgment value of the claim, if the claimant is represented by counsel who is presumed to be competent and ethical. The administrative law judge's understanding of the significance of a claimant's counsel's role in a settlement is consistent with the Fifth Circuit's teaching in *Nordahl*. The *Nordahl* court declared that the "principal effect" of the 1984 Amendments was to give parties "far greater contractual autonomy" to settle their claims than before, although settlement "approval is now *required* (and, for claimants with legal representation, automatic) in the absence of an affirmative determination of inadequacy or duress." *Nordahl*, 842 F.2d at 776 n.3, 21 BRBS at 36 n.3(CRT) (italics in original) (emphasis added).

Within the settlement application herein, as well as within the briefs filed following the Director's objection to the settlement, claimant and her counsel expressed unambiguous agreement with the provisions of the settlement. As claimant is represented by counsel who explained the pros and cons of her choices, and as the Act contains an automatic approval provision for settlements when claimants have legal representation, absent a specific disapproval of the settlement, it was reasonable for the administrative law judge to conclude that claimant is entitled to rely on the advice of her attorney. Thus, the administrative law judge did not abuse his discretion in giving weight to the opinions of claimant and her counsel when ascertaining the settlement's adequacy.[10] *Compare with Bomback v. Marine Terminals Corp.*, 44 BRBS 95 (2010) (administrative law judge

[10] Although *Nordahl* stated that adjudicators should second-guess even those claimants who are represented by counsel, *Nordahl*, 842 F.2d at 781, 21 BRBS at 40(CRT), the court's reasoning that follows appears to apply to *unrepresented* claimants:

> As the government explains, this agency responsibility is there to protect claimants, who are typically unskilled and untutored in actuarial principles (and frequently awed by large amounts of cash), from bargains that are not reasonably likely to be in their long-term interests.

Id., 842 F.2d at 781-782, 21 BRBS at 40(CRT). As claimant here is represented by counsel, to rely on the court's rationale would, as the administrative law judge stated, imply that her counsel is incompetent.

summarily approved settlement without discussing whether amount for future medical benefits was adequate; Board vacated and remanded).[11]

The Director's next, and primary, argument in challenging this settlement is that "[a]ctuarial adequacy of the settlement amount must be considered[,]" Dir. Brief at 20, and that the administrative law judge's failure to conduct such analysis renders his approval improper.[12] For this proposition, the Director cites Section 702.243(f)-(g) of the regulations, and footnote 7 of the Fifth Circuit's decision in *Nordahl*. Although this case arises within the jurisdiction of the Fifth Circuit, we disagree with the Director's argument that assessing the adequacy of this settlement requires an actuarial analysis pursuant to *Nordahl*.

In footnote 7 of *Nordahl*, the Fifth Circuit cited *Ingalls Shipbuilding Div. v. White*, 681 F.2d 275, 14 BRBS 988, *reh'g denied*, 690 F.2d 905 (5th Cir. 1982), and 20 C.F.R. §702.243(f)-(g), parenthetically explaining the citations as showing that "determining the adequacy of the agreed amount largely depends on the basis of actuarial tables." *Nordahl*, 842 F.2d at 781 n.7, 21 BRBS at 40 n.7(CRT).[13] However, the regulations cited do not support such a conclusion. Of the regulations cited by the court to support its statement that adequacy "largely depends" on an actuarial analysis, 20 C.F.R. §702.241-702.243, *only* Section 702.243(g) addresses the use of actuarial tables and, then, only under certain circumstances. Section 702.243(g) states:

> *In cases being paid pursuant to a final compensation order, where no substantive issues are in dispute*, a settlement amount which does not equal the present value of future compensation payments commuted, computed at the discount rate specified below, shall be considered inadequate unless the parties show that the amount is adequate. The probability of death of the

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[11] When medical benefits are involved, adequacy in Section 702.243(f) specifically requires ascertaining the cost and necessity of future medical benefits.

[12] The administrative law judge did not conduct a mathematical analysis; rather, he stated that "what is a fair assessment of the litigation risk and expected value . . . is extremely subjective." Order at 6.

[13] *See also Nordahl*, 842 F.2d at 781-782, 21 BRBS at 40(CRT) ("Typically, as here, the value of the claimant's rights under the Act depends upon a compound estimate of life expectancy and the extent of continuing disability in the future."); *id.*, 842 F.2d at 776 n.3, 21 BRBS at 36 n.3(CRT) (In discussing the 1984 Amendments, the court stated: "Adequacy is to be determined largely by comparison of the settlement with statistical norms and depreciation tables. 20 C.FR. §§ 702.241-.243.").

> beneficiary before the expiration of the period during which he or she is entitled to compensation shall be determined according to the most current United States Life Table. . . . The discount rate shall be equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 weeks U.S. Treasury Bills settled immediately prior to the date of the submission of the settlement application.

20 C.F.R. §702.243(g) (emphasis added). As the claim in this case had disputed issues and did not involve payments being made pursuant to a final compensation order, Section 702.243(g) does not apply.[14]

Further, the *Nordahl* reference to *White* is unhelpful. In *White*, the Fifth Circuit held that, while the Director has standing to appeal the approval of a Section 8(i) settlement, the administrative law judge did not have the authority, at that time, to approve the settlement. *Compare* 33 U.S.C. §908(i) (2012) *with* 33 U.S.C. §908(i) (1982). Therefore, the Fifth Circuit vacated the administrative law judge's approval of the settlement and remanded the case. It did not address the adequacy of the settlement. *White*, 681 F.2d 275, 14 BRBS 988. Accordingly, we reject the Director's assertion that the law requires the administrative law judge to perform an actuarial analysis of the settlement's adequacy in this case.

As *Nordahl* is controlling Fifth Circuit law, however, it behooves us to consider the reasoning of the Board and the court in actually addressing the adequacy of the settlement therein. In addressing the insurer's argument that the settlement was inadequate and should not have been approved, the Board held that the settlement agreement addressed the necessary issues, as it specifically indicated that the settlement was a compromise between the parties' differences regarding the claimant's ability to return to work and the nature and extent of his disability. Moreover, the settlement addressed the probability of the claimant's success were he to have litigated his claim, and, at oral argument before the Board, the parties agreed the settlement was not procured under duress, the settlement amount was adequate, and the contract was fair.

[14] Moreover, the statements made by the court "requiring" an actuarial analysis, and relied upon by the Director, were made in the court's discussion of whether an insurer may rescind an executed settlement agreement prior to formal approval. No such statements were included in the court's actual discussion of the adequacy of the settlement before it. Therefore, the statements are non-binding *dicta*. *Nordahl*, 842 F.2d at 781-782, 21 BRBS at 40(CRT). To the extent the statements, having been made in other parts of the decision were meant to apply to the adequacy discussion, the court did not apply them.

Accordingly, the Board rejected the employer's challenge to the settlement. *Nordahl*, 20 BRBS at 22.

In its decision, the Fifth Circuit also found that the settlement agreement contained the necessary elements and passed muster, citing Section 702.242(a)-(b). *Nordahl*, 842 F.2d at 783, 21 BRBS at 41(CRT); *Nordahl*, 20 BRBS at 22; *see also* 20 C.F.R. §702.243(f). The court then observed that "[a]dequacy is also *allegedly* proven by the fact that [the claimant's] demise at so early a point makes the settlement a virtual windfall for his widow." *Nordahl*, 842 F.2d at 783, 21 BRBS at 41(CRT) (emphasis added). "In hindsight," the court noted that the claimant would not have received much compensation in periodic payments had he not settled the claim, having died so soon, but it admonished the Director, stating:

> The government, however, exaggerates the narrowness of the consideration given applications and engages in some hyperbole in arguing that[,] far from furnishing a ground for rescission the insurer otherwise had no right to make, the disabled worker's early death conclusively demonstrated that the settlement amount was entirely "adequate" and entitled to approval.

Id., 842 F.2d at 783, 21 BRBS at 41(CRT). Thus, the court did not accept the Director's assertion that the settlement was "conclusively" adequate because $75,000 was much more than the claimant would have received for one week of disability compensation. Relatedly, a settlement is not "conclusively" inadequate if it does not provide a claimant with the amount she would have received had she had proceeded with litigation and fully succeeded in prosecuting her claim.

Finally, the Director contends the settlement is inadequate because the parties did not provide evidence of or sufficiently explain why paying claimant a lump sum of $140,500 is an adequate settlement for her disabling injury. The Director insists that the administrative law judge was unable to independently analyze the adequacy of this settlement because claimant was not more forthcoming and detailed with the explanation of her rationale for settling. For example, the Director disputes claimant's worry that she may not live to her full life expectancy because the parties did not provide facts to support such a fear.[15] The Director also rejects as hypothetical or "simply conjecture" the assertion that claimant may earn more in the future, and he suggests that claimant's

[15] The Director noted that if "the facts are of a sensitive nature, the District Director invited either party to contact him or the claims examiner by phone to shield the reason from unnecessary disclosure." Dir. Letter at 4. The administrative law judge questioned this invitation to engage in *ex parte* communications. *See* 5 U.S.C. §554(d); *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977); Order at 4.

reason for wanting a lump sum to help her pay debts might indicate that she agreed to settle for $140,500 under financial duress, especially because the settlement does not specify the type and amount of those debts and obligations. We reject the Director's contentions.

Section 702.243(f) of the regulations discusses the approval criteria. When the administrative law judge reviews a settlement application, he *shall*:

> determine whether, considering all the circumstances, including, where appropriate, the probability of success if the case were formally litigated, the amount is adequate. The criteria for determining the adequacy of the settlement application shall include, but not be limited to:
>
> (1) The claimant's age, education and work history;
> (2) The degree of the claimant's disability or impairment;
> (3) The availability of the type of work the claimant can do;
> (4) The cost and necessity of future medical treatment (where the settlement includes medical benefits.

20 C.F.R. §702.243(f).[16] A review of the settlement here reveals that the parties addressed the regulatory factors on pages 1 through 4 of their application. Additionally, in expressing her desire to have the settlement approved, claimant indicated, in general terms, the personal reasons for her decision. The Director asserts these reasons are not "good enough." Although the administrative law judge did not discuss each factor individually, he is required to consider "all the circumstances" including the risks of litigation.

In this case, the administrative law judge rejected the Director's argument that the risk to claimant in litigating this claim is not supported by the evidence. He found that employer submitted evidence, which claimant acknowledged but disputed, indicating claimant's physical evaluation efforts were sub-maximal, as well as its assertion that, for litigation purposes, it would have developed evidence showing that claimant could return to her usual work or had fewer restrictions, or it could have obtained a new labor market survey with different results. Order at 4, 6. Thus, the administrative law judge found there was risk to claimant in proceeding with litigation, based on potential unfavorable findings.[17] In light of employer's litigation strategy, claimant's acknowledgements

[16] Medical expenses are not at issue here.

[17] Claimant acknowledged employer's defenses and opted to forego "delay and uncertainty," and with the "advice of competent counsel," entered into an agreement. Emp. Letter to ALJ at 2.

thereof, and the fact that the administrative law judge found them credible, it is unreasonable for the Director to make judgments on the evidence as it stands and to presume that claimant's success is assured and that the risk to claimant of litigating her claim is slight. The administrative law judge also noted claimant's concerns about not living until the expected age, having debts to pay, and earning increased wages in the future that would decrease her entitlement to benefits, and he rejected the Director's assertions that claimant's statements cannot be accepted without further "specific substantiation" or some "confidential concession." Order at 5-6. He found that claimant and her attorney are in the best position to assess her litigation risks, her life expectancy, and her future earnings, and that neither is "obliged to explain to the Department the detailed specifics of the assessment of why she thinks she might lose her case." *Id.* The administrative law judge's conclusion is rational.

As employer and claimant argue, the Director fails to recognize that the settlement here is a *compromise* between the parties that acknowledges their disputed issues – it is not employer's agreement to pay claimant a discounted portion of what claimant could obtain were she to succeed on every aspect of her claim and live to or beyond expectations. Claimant and her attorney have assessed the situation and arrived at a mutually acceptable solution, the parties' settlement addressed the factors required by the regulation, and the administrative law judge accepted claimant's generalized reasons for her decision, considering the risk of litigation. *See Nordahl*, 20 BRBS at 22. As the administrative law judge considered "all of the circumstances, including success if the case were formally litigated," and the Director has not demonstrated that the settlement is inadequate or was procured under duress, we hold that the Director has not shown an abuse of discretion by the administrative law judge in approving the settlement. As the administrative law judge reasonably found the settlement to be adequate and not procured under duress, we affirm his approval of the settlement in this case.

Accordingly, the administrative law judge's Order Approving Settlement is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge