TOM L. MAYS	)	BRB No. 09-0221
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: 08/20/2013
	)	
Self-insured Employer-Respondent	)	
	)	
	)	
TOM L. MAYS	)	BRB No. 12-0663
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED (AVONDALE OPERATIONS) f/k/a NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Order Granting Employer's Motion to Dismiss Claimant's Request for Section 22 Modification and Cancelling Hearing of Clement J. Kennington, Administrative Law Judge, and the Order Denying Claimant's Motion for Supplemental Declaration of Default and Denying Attorney Fee of Bradley Soshea, District Director, United States Department of Labor.

Isaac H. Soileau, Jr., and Ryan A. Jurkovic (Soileau & Associates, L.L.C.), New Orleans, Louisiana, and Susanne Jernigan (The Jernigan Law Firm, L.L.C.), New Orleans, Louisiana, for claimant.

Richard S. Vale, Frank J. Towers, and Pamela Noya Molnar (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Employer's Motion to Dismiss Claimant's Request for Section 22 Modification and Cancelling Hearing (2002-LHC-00914) of Administrative Law Judge Clement J. Kennington and the Order Denying Claimant's Motion for Supplemental Declaration of Default and Denying Attorney Fee (No. 07-122166) of District Director Bradley Soshea rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986).

This case has been before the Board previously. To summarize, claimant sustained a blow to his head, a fracture of the right cheek, and a serious eye injury when he was kicked in an altercation at work on March 18, 1991. Employer paid temporary total disability and medical benefits from March 18 through August 6, 1991. Claimant sought additional benefits. In its first decision, the Board affirmed the denial of additional compensation, as well as the finding that employer refused to approve a change of physicians. However, the Board remanded the case for reconsideration of the necessity and reasonableness of the medical expenses sought by claimant. *Mays v. Avondale Industries, Inc.*, BRB No. 98-1084 (May 3, 1999). Following remand and appeal, the Board affirmed the administrative law judge's award of medical benefits. *Mays v. Avondale Industries, Inc.*, BRB No. 00-0557 (July 11, 2001).[1]

Meanwhile, claimant had filed and settled a third-party suit in Louisiana state court against the aggressor in the altercation for $60,000. *Mays v. Gliott*, No. 430-626 (La. Dist. Ct. Aug. 4, 2000). He did not obtain employer's prior written approval; however, employer participated in the settlement and, therefore, had notice of it. After the settlement, employer sought to terminate claimant's medical benefits via Section 33(g), 33 U.S.C. §933(g). The administrative law judge originally applied Section 33(g)

[1]The administrative law judge's decision was deemed affirmed by application of Pub. L. No. 106-554, 114 Stat. 2763. However, the Board also reviewed the contentions and held that the decision should be affirmed on its merits as well.

and found that claimant had forfeited his benefits under the Act. On reconsideration, he determined that Section 33(g) does not apply; however, he awarded employer a credit for the net settlement amount pursuant to Section 33(f), 33 U.S.C. §933(f), against its liability under the Act. The administrative law judge denied claimant's motion for modification on the issue of whether he is entitled to additional compensation, finding the motion was untimely filed. On appeal, the Board affirmed the administrative law judge's findings that: claimant entered into a third-party settlement; Section 33(g) does not apply because the settlement for $60,000 was for an amount greater than the amount of compensation to which claimant was entitled under the Act ($5,514.68); and Section 33(f) applies entitling employer to a credit against the net proceeds of the settlement against the medical benefits due. Additionally, the Board held that, as the claim remained open until the appeals were extinguished, claimant's motion for modification was not untimely filed. The Board remanded the case for the administrative law judge to consider claimant's contentions on modification. *Mays v. Avondale Industries, Inc.*, BRB Nos. 03-0228/A (Nov. 25, 2003).

On October 6, 2005, the Board issued an Order declining to address numerous motions made by claimant's counsel to the Board after issuance of the Board's 2003 decision, stating that "modification apparently remains pending before" the Office of Administrative Law Judges. It advised claimant that if he had new evidence, he should raise it in the modification proceedings. In November 2006, claimant filed a motion with the administrative law judge seeking, effectively, to terminate modification proceedings. The administrative law judge granted claimant's motion on December 7, 2006, reminding him that, if he wished to re-file for modification, he must abide by the limitations in Section 22. 33 U.S.C. §922.

On January 7, 2007, employer's appeal of the administrative law judge's order ceasing modification proceedings was acknowledged by the Board. BRB No. 07-0342. On February 12, 2007, claimant, *pro se*,[2] sent a letter addressed to the district director and the administrative law judge. In the letter, he requested information regarding the date of his deadline for filing a motion for modification. He also stated he was "definitely" going to file a motion for modification of the denial of compensation, and he laid out the basis for his contentions. After a follow-up letter from claimant, the administrative law judge responded on May 23, 2007, stating that he could not give claimant legal advice regarding the deadline for filing and that, because the case was on appeal, he was without jurisdiction over the case. On June 13, 2007, the Board granted employer's motion to dismiss its appeal. On June 22, 2007, claimant wrote to the Board asking for the deadline for filing for modification and for information about any pending appeals.

One year later, on June 24, 2008, claimant, again without counsel, requested that the district director issue an order of default against employer for its failure to pay

[2]Claimant had fired his attorney.

medical benefits. On November 12, 2008, the district director denied a declaration of default, finding that employer had a Section 33(f) credit in the amount of $28,116.08.[3] On December 15, 2008, claimant, *pro se*, asked the Board for an extension of time to re-file his motion for modification, and on that same date, the Board acknowledged claimant's appeal of the district director's order. BRB No. 09-0221.[4] On February 23, 2009, claimant, *pro se*, wrote a letter to the Board, moving for modification, asserting that all previous rulings contained mistakes of fact. On March 12, 2009, because of the motion for modification, the Board dismissed BRB No. 09-0221 without prejudice and remanded the case to the Office of Administrative Law Judges for modification proceedings. *See* 20 C.F.R. §802.301(c). The Board advised claimant that he could seek reinstatement of his appeal of the district director's order within 30 days after an order on modification was filed, and that any party also could appeal the decision on modification.

Following the Board's dismissal of claimant's appeal of the district director's order denying default, the parties discussed settling the case and cancelled the modification hearing. On August 17, 2010, claimant, *pro se*, wrote letters to the district director, the administrative law judge, and the Board asking to preserve his right to seek modification. Claimant's counsel[5] wrote a letter to the administrative law judge on August 4, 2011, asking to preserve claimant's right to modification; an updated "motion" was filed on July 13, 2012, stating that a hearing was scheduled for October 2012 and claimant would pursue modification then. Employer, on August 3, 2012, moved to dismiss claimant's motion for modification, arguing it had been untimely filed, and on September 5, 2012, the administrative law judge granted employer's motion to dismiss, finding that he had granted claimant's motion to terminate modification proceedings in 2006, the decision became final in June 2008, and claimant did not mention modification again until his December 2008 letter to the Board. Thus, the administrative law judge found that claimant's motion for modification was filed over 18 months after the final decision and was not filed in a timely manner. 33 U.S.C. §922. The administrative law judge also rejected claimant's argument that employer had waived the defense of untimeliness, finding that employer had raised the issue at the first opportunity. Claimant appeals the administrative law judge's decision. BRB No. 12-0663. On October 5, 2012,

[3]$60,000 settlement minus a request for $31,883.92 in medical expenses equals $28,116.08.

[4]In claimant's appeal of the district director's order, he mentioned that he is entitled to "reinstatement" of his disability benefits due to the many errors in prior decisions.

[5]Claimant retained counsel as of August 25, 2010, and co-counsel as of November 18, 2010. Claimant is represented by counsel in this appeal.

claimant moved for reinstatement of his appeal of the district director's denial of a default order, BRB No. 09-0221. The Board granted this motion on November 6, 2012. The two appeals were consolidated for decision. Order dated November 6, 2012; 20 C.F.R. §802.104.

Timeliness of Motion for Modification – BRB No. 12-0663

Claimant, again represented by counsel, first contends the administrative law judge erred in finding his motion for modification was untimely filed. He asserts that his letter dated February 12, 2007, to the district director and the administrative law judge, was sufficient to constitute a motion for modification and, alternatively, his letter to the Board dated June 22, 2007, constituted a timely-filed motion. Section 22 of the Act provides the only means for re-opening a claim that has been finally adjudicated. It states:

> Upon his own initiative, or upon the application of any party in interest . . ., on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . .

33 U.S.C. §922; *see Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

A claimant's request for Section 22 modification need not be formal in nature, but simply must be a writing which indicates an intention to seek further compensation. *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974) (memorandum of telephone call to district director indicating disagreement with termination of compensation was sufficient);[6] *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 F.App'x 333 (4th Cir. 2004) (letter to district director requesting "minimal on-going compensation" was sufficient); *Madrid v. Coast Marine*

[6]*See also McKinney v. O'Leary*, 460 F.2d 371 (9th Cir. 1972) (written memorandum of meeting between district director and claimant was sufficient); *Beegan v. Brady-Hamilton Stevedore Co.* 346 F.2d 857 (9th Cir. 1965) (letter requesting compensation but misfiled by district director due to incorrect case reference was sufficient); *Atlantic & Gulf Stevedores, Inc. v. Donovan*, 279 F.2d 75 (5th Cir. 1960) (letter from attorney to district director requesting compensation was sufficient); *Louisiana-Texas Waterways Co. v. U.S. Employees' Compensation Comm'n*, 19 F.Supp. 396 (W.D. Ky. 1935) (letter requesting claim form sufficient even though claim form was never filed).

Constr. Co., 22 BRBS 148 (1989) (phone calls to district director memorialized in writing seeking additional compensation were sufficient); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988) (doctor's notes of continuing medical problems were insufficient). Modification is permitted within one year of each final rejection of a claim, including a rejection on modification. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999). If a case has been appealed, the one-year period for filing a motion for modification begins to run on the date the decision denying modification becomes final; thus, modification may be requested within one year of the completion of the appellate process. *Black v. Bethlehem Steel Corp.*, 16 BRBS 138 (1984), *appeal dismissed*, 760 F.2d 274 (9th Cir. 1885) (table); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977); *see Cobb v. Schirmer Stevedoring Co.*, 2 BRBS 132 (1975), *aff'd mem.*, 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978). If the Board is advised that a motion for modification has been filed while a case is before it on appeal, it will dismiss the appeal and remand the case for modification proceedings. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988); 20 C.F.R. §802.301(c).

In February 2007, while the case was pending before the Board on employer's appeal, claimant, without counsel, wrote a letter addressed to both the district director and the administrative law judge asking for the deadline for re-filing his motion for modification and explaining that he "definitely" was going to re-file his motion due to mistakes in fact in the prior decisions. The administrative law judge's response was that he could not give claimant legal advice and that the Board had jurisdiction because the case was on appeal.[7] The administrative law judge, however, has never addressed whether this letter constituted a timely motion for modification. The fact that the letter was addressed to the administrative law judge and district director during the time an appeal was pending is of no importance. *See generally L.H. [Henderson] v. Kiewit Shea*, 42 BRBS 25 (2008); *Miller v. Central Dispatch, Inc.*, 16 BRBS 63 (1984). Moreover, as the letter was filed while employer's appeal was pending, the letter, if sufficient, was filed in a timely manner, as a motion for modification may be filed up to one year following a final rejection of the claim. *Duran*, 27 BRBS 8; *Black*, 16 BRBS 138. Because the administrative law judge did not address whether the February 2007 letter was sufficient to constitute a motion for modification, we must vacate his 2012 order dismissing claimant's motion for modification as untimely filed and remand this case for consideration of the sufficiency of the February 2007 letter.[8]

[7]The district director to whom the letter was addressed had long-since recused himself due to former ties with employer, and he repeated this information in his response to claimant.

[8]In light of our decision, we need not address claimant's assertion that employer's timeliness defense was waived for having been made in an untimely manner pursuant to Sections 13 and 22 of the Act, 33 U.S.C. §§913, 922.

On remand, the administrative law judge must apply the appropriate law to claimant's February 2007 letter, written *pro se*, and determine whether it constitutes a request for modification. *Bergeron*, 493 F.2d 545; *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999); *Gillus*, 37 BRBS 93; *Raimer*, 21 BRBS 98. It is irrelevant how a party labels his motion, provided it comes within the scope of Section 22, *i.e.*, a change in condition or mistake in fact. *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968). As claimant also asserts that his letter to the Board dated June 22, 2007, constitutes a writing sufficient to request modification, the administrative law judge should address whether that letter, either alone or in conjunction with the February 2007 letter, raised a request for modification. If the administrative law judge finds that either or both letters sufficiently raised modification, then he should commence proceedings to address claimant's motion for modification. If neither letter is a request for modification, then, as the next times claimant moved for modification were in December 2008 and February 2009, 18 and 20 months after the administrative law judge's 2006 order dismissing claimant's motion for modification became final in June 2007, then the administrative law judge may reinstate his finding that claimant's motion for modification was not timely filed. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 179 (2010), *aff'd*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir. 2011), *cert. denied*, 132 S.Ct. 757 (2011); *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002).

Timeliness of Request for Reinstatement of Appeal – BRB No. 09-0221

Upon claimant's motion for modification in February 2009, the Board dismissed claimant's appeal of the district director's order denying the request for an order of default and remanded the case for modification proceedings. In its Order, the Board advised claimant he could request reinstatement of this appeal within 30 days of the date the administrative law judge filed his decision on modification. 20 C.F.R. §§702.373, 802.301. On September 5, 2012, the administrative law judge found claimant's motion for modification untimely and granted employer's motion to dismiss. Claimant's motion for reinstatement of BRB No. 09-0221 is dated October 5, 2012. It was mailed on October 5 and received by the Board on October 11, 2012. Although the service sheet indicating the date the administrative law judge's decision was filed by the district director is not in the record, claimant's motion is considered filed as of the date it was mailed if it would be untimely based on the date of receipt by the Board. *See* 20 C.F.R. §802.207(b). October 5 is 30 days after September 5, therefore claimant's motion was timely filed, and we reject employer's argument to the contrary. Accordingly, we shall address the merits of claimant's appeal.

Merits of Reinstated Appeal – BRB No. 09-0221

Claimant appeals the district director's 2008 order denying claimant's motion for declaration of default. 33 U.S.C. §919; 20 C.F.R. §702.372. Claimant submitted to the

district director receipts for $31,883.92 in medical expenses which he stated employer had not paid. The district director found that employer had a credit of $28,116.08 remaining in light of the third-party settlement for $60,000. The district director, therefore, denied the motion for a default order. Claimant contends that $60,000 is the gross amount of the settlement and that employer's credit extends only to the net amount. Employer acknowledges that its credit is limited to the net amount; however, it correctly states that claimant did not submit evidence indicating the net amount of the proceeds.[9] Claimant asserts the district director's order should be vacated and the case remanded with instructions for the district director to properly apply Section 33(f).

Section 33(f) of the Act provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f). Thus, an employer is entitled to a credit in the amount of the net proceeds of a third-party settlement. *Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1(CRT) (5th Cir. 1991). The offset covers both medical and disability benefits and must be computed on a dollar-for-dollar basis. *Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 35 BRBS 103(CRT) (9th Cir. 2001); *O'Brien v. Evans Financial Corp.*, 31 BRBS 54 (1997) (Brown, J., dissenting on other grounds), *rev'd on other grounds sub nom. Evans Financial Corp. v. Director, OWCP*, 161 F.3d 30, 32 BRBS 193(CRT) (D.C. Cir. 1998); *Chavez v. Todd Shipyards Corp.*, 21 BRBS 272 (1988).

As a general practice, the proponent of a rule or proposition has the burden of proof/persuasion. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Claimant, in seeking additional benefits beyond his settlement proceeds, has the burden of showing his entitlement to them. As claimant contends, the district director erroneously compared the requested reimbursements to a "$60,000 credit," instead of to the net proceeds of the settlement. *O'Brien*, 31 BRBS 54.

[9]The settlement documents are not in the record before the Board. Moreover, claimant, in his request for reimbursement, in his initial appeal of the district director's order, or in his request for reinstatement of the appeal, did not supply a specific net dollar amount. Indeed, claimant's brief on appeal states only that "OWCP therefore should have calculated a net amount by deducting expenses and attorneys' fees from the gross amount." Cl. Brief at 20.

Therefore, we vacate the district director's finding, and we remand the case to the district director. However, as there is no evidence in the record establishing the amount of the net proceeds, claimant must re-file his request for reimbursement/default of medical expenses with the district director; claimant must supply to the district director appropriate settlement information.

Accordingly, the administrative law judge's Order Granting Employer's Motion to Dismiss Claimant's Request for Section 22 Modification and Cancelling Hearing is vacated, and the case is remanded to the administrative law judge for further findings consistent with this opinion. The district director's finding in his Order Denying Claimant's Motion for Supplemental Declaration of Default and Denying Attorney Fee that employer has a credit against the gross third-party settlement proceeds is vacated. The case is remanded to the district director for further proceedings correspondent to claimant's re-filing of his request for medical benefits/default order with appropriate support.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge