BRB No. 91-1436

SIDNEY MEYERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAYMOND FABRICATORS, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Order Dismissing Petition for Modification and the Supplemental Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Dismissing Petition for Modification and the Supplemental Order Awarding Attorney Fees (91-LHC-277) of Administrative Law Judge Quentin P. McColgin 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).

Claimant injured his right knee on January 3, 1983, during the course of his employment with employer. He filed a claim for compensation, and, finding a hearing unnecessary as there were no undisputed issues, the district director issued a compensation order awarding benefits on September 13, 1989. Comp. Order. The district director awarded claimant temporary total disability benefits from August 1, 1983, through April 30, 1987, and permanent total disability benefits

beginning May 1, 1987. Pursuant to the decision of the United States Court of Appeals for the Fifth Circuit in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), the district director calculated the Section 10(f), 33 U.S.C. §910(f), annual cost-of-living adjustments to claimant's compensation.[1] Because claimant had a pre-existing permanent partial disability, the district director also awarded employer Section 8(f), 33 U.S.C. §908(f), relief from continuing liability for compensation, beginning April 28, 1989. Comp. Order at 1-2. Additionally, the district director noted employer's agreement to pay Section 7, 33 U.S.C. §907, medical benefits. *Id.* at 3. No party appealed this decision.

[1]In *Holliday*, the Fifth Circuit held that claimants, upon becoming permanently totally disabled, are entitled to an increase in payments reflecting cost-of-living adjustments that accrued during previous periods of temporary disability. *Holliday*, 654 F.2d at 415, 13 BRBS at 741.

In 1991, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, for the purpose of recalculating claimant's benefits in light of the Fifth Circuit's decision in *Phillips v. Marine Concrete Structures*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*).[2] The Director, Office of Workers' Compensation Programs (the Director), opposed the motion and sought dismissal of the case. Claimant agreed with the Director. The administrative law judge, in agreement with the Director, issued an Order dismissing the petition for modification. Order at 1-2. The administrative law judge found that the district director's Compensation Order was not appealed and was, therefore, final, and he found that Section 22 modification is not available to employer for the purpose of recalculating benefits based on a subsequent change in law. *Id.* at 2. Thereafter, claimant's counsel filed a petition for an attorney's fee. The administrative law judge awarded counsel the requested fee of $544.50 to be paid by employer. Supp. Decision and Order. Employer appeals the administrative law judge's decisions, and no party has responded.

Employer contends that claimant's benefits should be adjusted pursuant to the Fifth Circuit's decision in *Phillips*. Specifically, on appeal, employer argues that *Phillips* is to be applied retroactively, and it asks the Board to modify the district director's award and order the Special Fund to pay benefits at the reduced rate, or, alternatively, to reverse the administrative law judge's dismissal of the motion and remand the case for a modification hearing. In support of its arguments, employer quotes the Fifth Circuit's statement that:

[2]In *Phillips*, the Fifth Circuit overruled its decision in *Holliday* and held that claimants are not entitled to Section 10(f) adjustments during previous periods of temporary total disability. *Phillips*, 895 F.2d at 1035, 23 BRBS at 38 (CRT); *see also* 33 U.S.C. §910(f) (1988).

as to Phillips and other claimants in this circuit, future payments may be adjusted to the amount that would have been calculated absent the *Holliday* formula, although no refund of past excess payments made pursuant to *Holliday* shall be required.

Phillips, 895 F.2d at 1036, 23 BRBS at 39 (CRT).

The Board recently addressed these Section 10(f) and Section 22 issues in its decision in *Ryan v. Lane & Co.*, 28 BRBS 132 (1994). In that case, the Board rejected the employer's argument that *Phillips* should be applied retroactively. It noted that the administrative law judge reasonably inferred that the reference to "other claimants in this circuit" refers to those claimants whose cases are properly pending, and not those whose claims are, as in the instant case, the subject of a final compensation order. The Board also noted that retroactive application of *Phillips* to such final decisions would be contrary to the decision of the Supreme Court of the United States in *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988). In *Sebben*, the Court held that it would not order the re-adjudication of black lung claims decided under erroneous standards where the cases had already become final by reason of the claimants' failure to pursue administrative remedies or appeals to the courts within the prescribed time. *See Ryan*, 28 BRBS at 135. As the district director's compensation order in this case is final, we reject employer's argument that the Fifth Circuit's decision in *Phillips* may be applied to it, for the reasons stated in *Ryan*.

Similarly, we reject employer's contention that the administrative law judge erred in dismissing its motion for modification. In order to modify a final decision, the party seeking modification must demonstrate a change of condition or a mistake in a determination of fact. 33 U.S.C. §922; *Swain v. Todd Shipyards Corp.*, 17 BRBS 124 (1985). Employer, however, has not raised any mistake in fact or change in condition with regard to the initial award of benefits, including the Section 10(f) adjustments. Instead, it argues that the concept of "mistake in a determination of fact" includes mixed questions of law and fact, *see Presley v. Tinsley Maintenance Service*, 9 BRBS 588 (1979), and that the issue it raises before the Board presents such a question. Contrary to employer's argument, it has not introduced a mixed question of fact and law; rather, it seeks to re-open this case because of the Fifth Circuit's subsequent legal interpretation of Section 10(f) of the Act. *Ryan*, 28 BRBS at 135. Section 22 does not apply to an issue involving legal interpretation which is decided against a party, as legal issues must be timely appealed under Section 21 of the Act, 33 U.S.C. §921. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Ryan*, 28 BRBS at 135; *Maples v. Marine Disposal Co.*, 16 BRBS 241 (1984). As employer has not justified its request to re-open this case, we affirm the administrative law judge's determination that no valid basis exists for granting modification in this case. *See Ryan*, 28 BRBS at 135; *see also Sebben*, 488 U.S. at 105, 12 BLR at 2-89; *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Finally, employer maintains it is not liable for claimant's attorney's fee. It does not, however, challenge the amount of the fee award. Claimant participated in the proceedings before the

administrative law judge, agreeing with the Director's position. The administrative law judge determined that counsel's participation resulted in a "successful defense" of the award and "is tantamount to the `successful prosecution of the claim.'" Supp. Decision and Order at 1; *see also* 33 U.S.C. §928. Consequently, he concluded that employer is liable for counsel's fee, and that the requested fee of $544.50 is reasonable. *Id.* at 2. As claimant's counsel mounted a successful defense against employer's attempt to re-open the case and recalculate claimant's award, we affirm the administrative law judge's fee award of $544.50, assessed against employer. *See generally Hensley v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1050, 15 BRBS 43 (CRT) (D.C. Cir. 1982); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

Accordingly, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge