Benefits Review Board Settles Time Limit for Section 22 Modification Request Following a Compensation Order Partially Rejecting A Claim

On March 30, 2023, the Benefits Review Board issued a published decision in *Steve Bussanich v. Marine Terminals Corporation d/b/a Ports America*, 57 BRBS 21 (BRB No. 2022-0071), clarifying when the one-year time limit to seek modification under section 22 begins to run following a compensation order which awards some compensation but also partially rejects aspects of the claim. In resolving any doubts about how to apply section 22's time limits in cases involving partial rejections, the decision holds that a party has one year from the date of the final denial of the contested part of the claim to seek modification.

INTRODUCTION

Under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950 (LHWCA), compensation is to be paid periodically, promptly, and directly to the entitled beneficiary, without an award, except where the employer controverts liability. 33 U.S.C. § 914(a). When such a dispute arises, claimants are entitled to a formal hearing on the claim before an ALJ. 33 U.S.C. § 919(c, d). After hearing the case, the ALJ must issue a compensation order that rejects the claim or makes an award. 33 U.S.C. § 919(c, e). Compensation orders become effective immediately upon filing in the office of the District Director. 33 U.S.C. § 921(a). An effective order is payable within ten days of filing. *See e.g., Carilo v. Louisiana Insurance Guaranty Association*, 559 F.3d 377, 379 (5th Cir. 2009), citing *Tidelands Marine Serv. v. Patterson,* 719 F.2d 126, 127 n. 1 (5th Cir.1983) for the proposition that the statutory term relating to a compensation order's "effectiveness" in section 921(a) is the equivalent of it becoming "due," and thus payable, with additional compensation also coming due under Section 914(f) if not paid within ten days of filing. Once filed, a compensation order can be altered in three ways, through: (1) reconsideration; (2) appeal; or (3) modification. A party has ten days to seek reconsideration, see 20 C.F.R. § 802.206; 29 C.F.R. § 18.93, 30 days to appeal to the Benefits Review Board, see 33 U.S.C. § 921(a, b), and one year to seek modification. See 33 U.S.C. § 922; 20 C.F.R. § 702.373.

Section 22 modification is intended to be extraordinarily broad. It permits the correction of mistaken factual findings and "vest[s] a deputy commissioner with broad ... discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, *or merely further reflection on the evidence initially submitted.*" *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497 (4th Cir. 1999), citing *O'Keeffe v. Aerojet–General Shipyards, Inc.,* 404 U.S. 254, 256 (1971) (emphasis added). And Congress intended that this discretion be exercised whenever "desirable in order to render justice under the act." *Banks v. Chicago Grain Trimmers Ass'n,* 390 U.S. 459, 464 (1968). Moreover, *any* mistake of fact may be corrected, including the ultimate issue of benefits eligibility. *Jessee v. Director, OWCP,* 5 F.3d 723, 725 (4th Cir.1993). Indeed,

the preeminent treatise writer on workers' compensation has noted that these "broad Supreme court interpretations superimposed on the broad statutory provision" is seen as "endow[ing] the Longshoremen's Act with perhaps the most permissive mistake reopening rule on record." 3 Arthur Larson, The Law of Workmen's Compensation, § 81.52(b) at 15-1194.129 (1996). Because Section 22's time limit is the lengthiest of the three ways to seek alteration of a compensation order, and because of its broad liberal nature, it is crucial to know how to determine when modification relief under Section 22 is available.

Section 22 contains two different time limit clauses based on two different types of events: one limit is based on the last date that a compensation payment was made, while the other limit is based on the date the claim was "rejected." The issue presented in this latest iteration of *Bussanich* is how Section 22's "rejection" clause should be interpreted: does "rejection of a claim" refer only to the situation when an ALJ awards no compensation on a claim, or does it refer to instances where the ALJ awards some, but less than all, compensation sought. In the second group of cases, a compensation payment has been made so the question is whether Section 22's one year time limit is triggered by (1) the date that last compensation payment is made, or (2) the date the "rejection" is deemed final.

BACKGROUND

Bussanich was injured while working for Ports America on December 1, 2013. Ports voluntarily paid compensation for temporary total disability (TTD) before controverting the claim on the grounds that Bussanich had reached maximum medical improvement. In a decision dated April 27, 2017, an administrative law judge found that Bussanich was TTD from December 1, 2013 to March 20, 2014, and temporarily partially disabled (TPD) from March 21, 2014 to October 17, 2014. Denying Bussanich's claim for ongoing compensation for permanent total disability (PTD), the judge terminated Bussanich's benefits as of October 17, 2014. Ports paid all TTD and TPD compensation due under the order with the last payment of compensation being made on June 13, 2017.[1] Bussanich timely appealed the decision to the Board, which affirmed the ALJ on March 27, 2018. *Bussanich v. Ports America*, BRB No. 17-0477 (unpub.). Bussanich timely appealed to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the Board's decision on December 10, 2019. *Bussanich v. Ports America*, 787 Fed. App'x 405, 406 (9th Cir. 2019).

THE ALJ'S MOST RECENT DECISION

On December 3, 2020, Bussanich requested modification under 33 U.S.C. § 922, submitting new medical evidence. The modification request was filed less than a year after the Ninth Circuit's

[1] Ports' check for all compensation owed under the order was initially received by Bussanich on June 16, 2017, but Bussanich did not cash it. The Employer reissued another check and Bussanich cashed that on December 17, 2018.

December 10, 2019, final rejection of his claim, but more than a year after the last payment of compensation (whether that was considered to be on June 16, 2017 or December 17, 2018). The modification request was assigned to a different administrative law judge and Ports moved for summary decision under 29 C.F.R. § 18.72. Ports argued that the legislative history of Section 22, and in particular the Act of June 25, 1938, Ch. 685, § 10, supported interpreting the word "rejection" to mean only the complete denial of compensation for a claim, i.e., cases where the order for which modification is sought made no award of compensation. Ports further argued that the language and structure of the Act as a whole, and Section 19 specifically, also indicated that "rejection" could mean only a total denial of compensation because the statute was binary; a compensation order either awarded benefits or rejected the claim. Ports concluded that the "rejection" clause of Section 22, which affords a party one year from "rejection" to seek modification, was not applicable where the previous order included any payment of compensation. In such cases, like Bussanich's 2017 compensation order, where a payment was awarded, Section 22's one year limit ran from the date of the last payment.

The judge granted Ports' motion for summary decision and denied Bussanich's modification request as untimely. The ALJ ruled that, because the 2017 compensation order had awarded Bussanich compensation, his claim was not "rejected" within the meaning of Section 22. Thus, Bussanich had only one year from the last payment of compensation – until either June 2018 or December 2019 – to seek modification. Because Bussanich did not seek modification until 2020, that request was made beyond Section 22's one-year time limit and could not be entertained.

In the ALJ's order granting Ports' motion for summary decision, the ALJ did, however, recognize two important propositions regarding Section 22's time limits: that (1) "although section 22 appears to describe only a binary of possibilities: either payments were made or a claim was denied, the reality can be more complex;" and (2) the Board has previously interpreted Section 22's "rejection" provision as establishing a one-year time limit from a final adverse decision, not an initial decision rejecting the claim. Citing *Moore v. Va. Int'l Terminals, Inc.*, 35 BRBS 28, 30 (2001), the ALJ noted that the Board has held: "If a claim is denied, time begins to run on the date the decision becomes final; thus, modification may be requested within one year after the conclusion of the appellate process." Furthermore, the ALJ conceded that it is likely "more logical and judicially efficient" for a party seeking modification to exhaust the appeals process and then file for modification afterwards." Notwithstanding these countervailing points, the ALJ ruled, in the purported service of "a plain reading of the statute," that Bussanich's time to seek Section 22 modification began to run when Ports made its last compensation payment on June 16, 2017 and therefore, Bussanich's December 2020 application for modification was made outside the one-year time limit. Accordingly, the ALJ found the modification request untimely.

THE BOARD DECISION

The Board found Bussanich's modification request timely, vacated the grant of summary decision, and remanded the case for the administrative law judge to consider whether to modify the order on its merits. The Board held that it had prior precedent, in the decision of *Cobb v. Schirmer Stevedoring Co.*, 2 BRBS 132 (1975), *aff'd sub. nom.*, 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978), establishing that for purposes of Section 22, a "rejection" includes a rejection of a portion of the claim where the compensation sought is only partially awarded. Although Bussanich had argued that *Cobb* applied, the ALJ never mentioned the case in his decision. The Board declared *Cobb's* holding as being that a "rejection" under Section 22 occurs when part of a claim has been denied and the one-year limit is not triggered until all appeals have been exhausted on the claim. Here, that meant Bussanich's modification request was timely.

DISCUSSION

Section 22 provides in pertinent part:

> 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 deputy commissioner, the deputy commissioner 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 … in accordance with the procedure prescribed in respect of claims in section 919 of this title . and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. …

33 U.S.C. § 922 (emphasis added).

Thus, there are two separate clauses in Section 22 which establish separate triggers for that provision's one-year time limit. In *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977), the Board cited *Cobb v. Schirmer Stevedoring Co.*, 2 BRBS 132 (1975) for the proposition that under the "rejection" branch, a request for modification must be made within one year from the date that the compensation order becomes final, not from the date that the adjudicator rejects the claim. In those cases, the Board reasoned that to hold otherwise would often result in a claimant appealing an adverse compensation order while at the same time having to relitigate the same issue while his appeal was pending in another forum. Such a result would be both unfair and absurd.

Since then, decisions have established without any doubt the principle that the one-year time limit for Section 22 modification commences with the date on which a decision rejecting the claim becomes final. Thus, modification may be requested within one year after the conclusion of the appellate process. See, e.g., *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Moore v. Va. Int'l Terminals, Inc.*, 35 BRBS 28, 30 (2001). In fact, one court has held that if the decision sought to be modified was rendered by the court of appeals, the claimant has one year from the date the court mandate issues, not the date of the court's final decision. *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th Cir. 1999).

The dispute in Bussanich focused instead on which class of cases to which Section 22's "rejection of a claim" clause applies. The ALJ rigidly (and erroneously) interpreted the "rejection" clause to apply only if no compensation payment at all was made under the order from which modification was sought. That determination was contrary to *Cobb.*

In *Cobb*, the Board was faced with almost identical circumstances to those in Bussanich. The worker was awarded some, but not all, requested compensation in a 1967 compensation order. 2 BRBS at 135. The last payment of the compensation awarded was made on August 18, 1967. *Id*. The worker, intent on pursuing additional compensation beyond the amount awarded, appealed the decision to the district and circuit courts, both of which affirmed, with the circuit court's decision issued December 21, 1969. *Id*. at 137. On September 29, 1970, the worker sought modification of the 1967 order. Ultimately, an administrative law judge found the worker's application time-barred because it was not filed within one year of the last payment of compensation in 1967.[2] *Id*. at 135.

On appeal, the Board reversed finding that the administrative law judge interpreted Section 22's time limit incorrectly. The Board held that the 1967 compensation order did not become final under 33 U.S.C. § 921 because it was appealed within 30 days. "Reading Sections 21 and 22 of the Act together, the Board finds that Cobb's claim for additional compensation was not 'rejected' within the meaning of Section 22 until the conclusion of appellate proceedings on November 21, 1969." *Id*. at 137. Consequently, it held that "the claimant's election to seek review of a compensation order in the Federal courts does not preclude his later applying for modification of the order within a year of the rejection of his claim by the appellate courts." *Id*. at 138 (citing, among others, *Calbeck v. Suderman Stevedoring Co*., 290 F.2d 308, 309-10 (5th

[2] The early stages of *Cobb* preceded the 1972 Amendments to the LHWCA, making the LHWCA's former claim process applicable. That process called for orders made by the Deputy Commissioner with initial district court review of the Deputy Commissioner's decision. The 1972 Amendments took effect while the case progressed. Accordingly, the now-created Board came to review the modification decision. 2 BRBS 132 (1975).

Cir. 1961) (holding that a two-year old compensation order, under which all compensation had been paid, was still subject to modification under Section 22 after the Court's decision)).

Critically, the Board concluded that the timeliness of the section 22 modification request was properly analyzed under the "rejection of a claim" clause even though the 1967 order from which modification was sought included the payment of some compensation to the worker. The Board reasoned that the claim for compensation over and above that awarded in the 1967 order "was not 'rejected' within the meaning of Section 22 until the conclusion of appellate proceedings." 2 BRBS at 136. Thus, in *Cobb*, the Board held both that a claim is "rejected" even if it is only partially rejected, and that it is not finally rejected until any appeals are exhausted. The ALJ in Bussanich erroneously recognized only the second of those two propositions while ignoring the first.

In the Director's view, both the plain language and the legislative history of Section 22 support the Board's reading in *Cobb*. Further, the purposes of Section 22 are also best served by an interpretation of the term "rejection" as including those instances where a partial amount of compensation is awarded but other portions of the requested relief are in fact "rejected."