

BRB Nos. 00-0854  
and 00-0854A

WILLIE GILLIAM	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED: <u>May 16, 2001</u>
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order on Modification and Order Denying Employer's Motion for Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Modification and Order Denying Employer's Motion for Reconsideration (99-LHC-1545) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 back while working as a shipfitter in employer's

submarine shop in December 1989. After the injury, claimant's treating physician, Dr. Byrd, imposed permanent work restrictions and employer subsequently provided employment within those restrictions. Employer paid various periods of temporary total disability benefits between January 1990 and February 1994, and terminated the payment of benefits as of September 12, 1996. Claimant thereafter filed a claim seeking permanent partial disability benefits for an alleged loss of overtime due to his work-related injury, which was denied by the administrative law judge's decision filed January 31, 1997.<sup>1</sup>

In April 1997, Dr. Byrd discussed the possibility of surgery with claimant, prompting claimant to seek modification on June 3, 1997, via the filing of a letter with the district director, for "additional temporary total disability compensation as of the date when he needs surgery and for permanent partial disability compensation as of the present and continuing." Claimant's Exhibit (CX) 2. The case was eventually referred to the Office of Administrative Law Judges for a formal hearing which took place on November 17, 1999. Prior to that, by letter addressed to the district director dated November 11, 1998, claimant renewed his request for modification and additionally requested temporary total disability benefits for the period of June 18, 1998, through June 22, 1998, based on Dr. Byrd's taking claimant off work as a result of injury-related pain, as well as a nominal award of \$1 per week based on *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In his Decision and Order on Modification, the administrative law judge awarded the requested four-day period of temporary total disability benefits but denied the request for a nominal award. In denying the nominal award, the administrative law judge determined that claimant failed to demonstrate that there is a significant possibility that he will need surgery and thus miss work or suffer a diminished wage-earning capacity. In its motion for reconsideration employer argued that claimant's modification requests were invalid and untimely, and thus it

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<sup>1</sup>Specifically, the administrative law judge found that claimant did not prove that he sustained a compensable loss of overtime under the Act, as the credible, uncontradicted testimony of claimant's post-injury supervisor, Mr. McAllister, conclusively established that there were no occasions when claimant was not offered overtime when his job came up for overtime.

asserted that claimant did not have a viable claim for temporary total disability benefits. In considering employer's motion, the administrative law first found that the petition for modification filed June 3, 1997, to the extent that it involved the possibility of future surgery, was invalid as it was an anticipatory filing. The administrative law judge, however, found that claimant's subsequent request for modification, specifically his request for a period of temporary total disability benefits, was timely insofar as the issue was first raised during the pendency of the 1997 motion, which tolled the statute of limitations in Section 22. The administrative law judge therefore rejected employer's contentions and accordingly reaffirmed his award of a period of temporary total disability benefits.

On appeal, claimant challenges the administrative law judge's denial of a nominal award of benefits. Employer responds, urging affirmance. On cross-appeal, employer challenges the administrative law judge's determination that claimant's second request for modification was timely. Claimant responds, urging affirmance.

### **Nominal Award**

Claimant initially argues that, contrary to the administrative law judge's decision, he is entitled to a nominal award of benefits as his treating physician has stated that he is likely to need surgery in the future, which will in turn affect his wage-earning capacity in the future. Claimant also argues that the administrative law judge applied a higher burden of proof than the one set out by the Supreme Court in *Rambo II*, by requiring the presence of a definitive statement by claimant's treating physician as to the necessity of surgery in the future.

A nominal award is appropriate where claimant has not established a present loss in wage-earning capacity under Section 8(c)(21), (h) of the Act, 33 U.S.C. §908(c)(21), (h), but has established that there is a significant possibility of future economic harm as a result of the injury. *See Rambo II*, 521 U.S. at 121, 31 BRBS at 54(CRT); *see also Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT)(4<sup>th</sup> Cir. 1985). In the instant case, the administrative law judge determined that claimant failed to demonstrate that there is a significant possibility that he will need surgery, and thus, a significant possibility that he will miss work or suffer a diminished wage-earning capacity in the future. In particular, the administrative law judge found that claimant's unreasoned, self-serving, hearsay testimony that Dr. Byrd had told him that he might need to have surgery,<sup>2</sup> did not

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<sup>2</sup>At the hearing, claimant stated that "[surgery is] a possibility," that surgery "was kind of up in the air," and that Dr. Byrd told him that he might need to have surgery "down the road." Hearing Transcript (HT) at 18-19.

establish the requisite significant possibility of future economic harm as a result of his injury. In contrast, the administrative law judge found determinative the absence of any direct statement by Dr. Byrd attesting to the significant possibility of surgery in the future and the presence in the record of Dr. Byrd's written statement approving claimant's decision not to have surgery.<sup>3</sup> As the administrative law judge's finding that the credible evidence of record does not support a finding that there is a significant possibility that claimant will sustain future economic harm as a result of his injury is rational, supported by substantial evidence and in accordance with law, it is affirmed.

Additionally, we reject claimant's contention that the administrative law judge imposed too great a burden on claimant to establish his entitlement to a nominal award, as the administrative law judge properly considered the relevant evidence of record under the appropriate standard as set out in *Rambo II*, i.e., whether claimant has established that there is a significant possibility of future economic harm as a result of the injury. See *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT). Moreover, the administrative law judge's brief discussion regarding the kind of evidence that he envisioned that the Supreme Court would like to see to meet the *Rambo II* burden does not alter the fact that he applied the appropriate standard and rationally found that the evidence of record is insufficient to meet that standard. Cf. *Barbera v. Director, OWCP*, F.3d , No. 00-3212, 2001 WL 292989 (3d Cir. March 12, 2001) (nominal award supported by substantial evidence, including medical opinion that claimant's condition would inevitably deteriorate). Accordingly, the administrative law judge's denial of a nominal award is affirmed. See *Buckland v. Dept. of the Army*, 32 BRBS 99 (1997).

### **Modification**

Employer argues that the administrative law judge erroneously concluded that claimant's request for modification was filed in a timely manner. Employer specifically asserts that, contrary to the administrative law judge's finding, claimant did not file a valid claim for modification within the one-year period provided under Section 22 of the Act, 33

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<sup>3</sup>In his medical report dated April 15, 1997, Dr. Byrd stated that "[claimant] is not interested in considering any type of further surgery which I think is an appropriate decision." CX 5d. Subsequent reports by Dr. Byrd dated June 13, 1997, December 2, 1997, and June 23, 1998, make no mention of any potential need for surgical intervention. CX 5a, b, c.

U.S.C. §922, which commenced on January 31, 1997, the date the administrative law judge's decision was filed in the district director's office. Employer further argues that the administrative law judge erred by allowing claimant to bootstrap a claim for temporary total disability compensation first made at the 1999 hearing onto the allegedly invalid request for modification filed in 1997.

In his initial decision on modification, the administrative law judge did not discuss the timeliness of claimant's request for modification and instead proceeded directly to the issue of whether he was entitled to benefits. On reconsideration, however, the administrative law judge determined that claimant's motion for modification as it concerned the potential for surgery is invalid as it was an "anticipatory filing." Order Denying Employer's Motion for Reconsideration at 1. The administrative law judge nevertheless concluded that the subsequent request for an award of temporary total disability benefits was a timely motion for modification as the issue was first raised during the pendency of the 1997 motion, and that although that initial motion was invalid, it nonetheless tolled the statute of limitations in Section 22.

A motion for modification pursuant to Section 22 must be filed within one year of the denial of the claim or of the last payment of benefits. 33 U.S.C. §922.<sup>4</sup> It is well settled that

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<sup>4</sup>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*

an application for modification under Section 22 need not be formal in nature or on any particular form, as long as it can be discerned that an actual claim for additional compensation is being made. *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4<sup>th</sup> Cir. 1998); *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5 (2000), *aff'd mem.*, 238 F.3d 413 (4<sup>th</sup> Cir. 2000)(table); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

In *Pettus*, the last payment of compensation was made to the claimant on August 28, 1989. In early September 1989, claimant's counsel sent a letter to the Office of Workers' Compensation Programs (OWCP) stating, "Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the [Act]." *Pettus*, 73 F.3d at 525, 30 BRBS at 7(CRT). OWCP did not take any action in response. In October and November 1989, the claimant was temporarily totally disabled. In December 1989, counsel sent another letter to OWCP stating, "[p]lease be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [Act]." *Id.* OWCP did not respond to this letter either. In November 1990, claimant obtained a disability slip from his doctor covering the 1989 period of disability. This was filed with OWCP in January 1991 along with a request for an informal conference. The administrative law judge found that the September and December 1989 letters were not valid requests for modification, and he found the January 1991 request to be untimely. The Board reversed the determination that the December 1989 letter was not a timely and valid request for modification.

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*time prior to one year after the rejection of a claim*, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title. . . .

33 U.S.C. §922 (emphasis added).

On appeal to the Fourth Circuit, the court reversed the Board. The court held that the letters were insufficient for “a reasonable person to conclude that a modification request has been made.” *Id.*, 73 F.3d at 527, 30 BRBS at 9(CRT). Specifically, the court held that the letters made no reference to a change in condition, to a mistake in fact in an earlier decision, to additional evidence concerning claimant’s disability, or to dissatisfaction with earlier decisions. *Id.* The court concluded that the letters failed to indicate any actual intention on claimant’s part to seek compensation for a particular loss, “a factor that is critical in assessing their sufficiency.” *Id.*<sup>5</sup> Moreover, the court reasoned that the September 1989 letter could not state such an intention, as the claimant did not sustain further disability until October 1989, and that the December 1989 letter did not note the period of disability, and observed that neither letter spurred any action on the part of the district director.

In *Greathouse*, 146 F.3d 224, 32 BRBS 102(CRT), the claimant injured his leg in 1978. In 1981, the parties stipulated to periods of temporary total disability and to a 10 percent permanent partial disability award under the schedule. At this time, claimant was aware that his injury would require surgery every few years to remove scar tissue. Employer subsequently paid additional temporary total and permanent partial disability benefits. The last payment was made on October 1, 1987. In February 1988, the Department of Labor informed claimant that he would have to request modification by October 1, 1988. Claimant did not request additional benefits until 1991, after another surgical procedure.

Claimant claimed that doctors’ reports submitted by employer to OWCP within one year of October 1, 1987, constituted a timely request for modification. The Fourth Circuit disagreed. It stated that the reports in question were submitted by employer, and did not “facially indicate [claimant’s] intent to request a modification of the original order.” *Greathouse*, 146 F.3d at 226, 32 BRBS at 104(CRT). The reports also stated the doctor anticipated that claimant’s impairment would increase to 20 percent, but the court noted that claimant had already been paid for a 20 percent impairment, and that anticipatory filings cannot manifest the necessary intent to seek modification, citing *Pettus*. The court thus concluded that neither employer nor OWCP reasonably could have concluded that a claim for modification was being made within the one-year period following the last payment of compensation. *Id.*

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<sup>5</sup>The court contrasted the letters with the request for modification in *Fireman’s Fund Ins. Co. v. Bergeron*, 493 F.2d 545, 546 (5<sup>th</sup> Cir. 1974), wherein the claimant wrote, “The claimant is permanently totally disabled and will file for a review under §22 of the Act.”

In *Meekins*, 34 BRBS 5, the claimant sustained a work-related knee injury in 1979, and was awarded benefits in 1983 for temporary total disability and permanent partial disability under the schedule, 33 U.S.C. §908(c)(2), for a 15 percent impairment to the leg. In 1989, employer voluntarily paid claimant for an additional 15 percent impairment as claimant's condition had deteriorated. In 1994, claimant was laid off from his light-duty job at the shipyard and filed a claim for temporary total disability benefits. In a decision issued in 1995, the administrative law judge awarded claimant temporary total disability benefits for the period between April 11 and September 14, 1994. It is undisputed that employer paid the amount owed on October 10, 1995.

On February 7, 1996, within one year of the last payment of benefits as required by Section 22, claimant's counsel wrote the following letter to the district director:

Claim is hereby made on behalf of my client, Howard T. Meekins, for additional (temporary total, permanent total, permanent partial, temporary partial) benefits in addition to those previously paid and pursuant to Order filed in your office on October 4, 1995. Please consider this a request for additional compensation in modification of the previous award and not a request for the scheduling of an informal conference.

*Meekins*, 34 BRBS at 6. In March 1998, claimant's counsel wrote to the district director and specified periods starting in October 1997 for which claimant sought additional temporary total disability benefits. At this time, claimant asked that an informal conference be scheduled on the matter.

Upon referral of the case to the administrative law judge, employer filed a motion for summary decision. Employer contended that, although claimant filed a letter requesting modification within one year of the last payment of benefits, he did not specify the benefits to which he believed he was entitled at that time, and in fact had no cognizable claim until October 1997. The administrative law judge agreed with employer that claimant's February 7, 1996, letter did not constitute a valid claim for Section 22 modification, inasmuch as claimant did not have such a claim until October 1997. He also found that the letter was merely an attempt to preserve indefinitely the right to seek modification, and that such protective filings are not permissible. Accordingly, the administrative law judge granted employer's motion for summary decision.

On appeal, the Board affirmed the administrative law judge's determination that claimant did not timely file a valid claim for modification. *See Meekins*, 34 BRBS 5. The Board specifically held that the February 1996 letter did not claim a particular disability and that, in context, it was clear that claimant did not intend that the claim be processed in

accordance with the Act.<sup>6</sup> *Meekins*, 34 BRBS at 8; *see also* 33 U.S.C. §§919, 922.

The decisions in *Pettus*, *Greathouse* and *Meekins* provide the context in which we evaluate claimant's filing in this case. The administrative law judge's initial decision and order denying benefits was filed with the district director on January 31, 1997. Thus, claimant had until January 31, 1998, in which to file a timely petition for modification under Section 22. Claimant's letter, dated June 3, 1997, is timely in this regard. In his letter, claimant herein asked the district director to:

Kindly accept this letter as *a request for modification* in the decision previously filed in the Office of the District Director on January 31, 1997. Mr. Gilliam believes his *condition has deteriorated* and that he is now further disabled. He has been back to see Dr. Byrd since the administrative law judge's decision. Apparently it is now being considered that Mr. Gilliam may need further surgery. In light of this *change in medical circumstances*, claimant now requests compensation for additional temporary total disability as of the date he needs surgery and for permanent partial disability as of the current date and continuing.

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<sup>6</sup>The Board noted that it was not until March 1998 that claimant identified a period of disability that allegedly occurred in November 1997. *See Meekins*, 34 BRBS 5.

CX 2 (emphasis added). As evidenced by the highlighted language the letter shows a clear intent to request modification. *See Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5<sup>th</sup> Cir. 1974). Additionally, this letter makes a claim for a specific type of benefits, *i.e.*, a period of temporary total disability benefits if anticipated surgery occurs and a continuing award of permanent partial disability benefits. At least insofar as the request for permanent partial disability benefits is concerned, the letter refers to a specific time period for those benefits, *i.e.*, from June 3, 1997, the date of the letter, and continuing. Thus, the petition for modification in the instant case is much more definitive than those in *Pettus*, *Greathouse*, and *Meekins*,<sup>7</sup> as it specifically seeks modification, claims a deteriorating condition and references a claimed disability purportedly in existence at the time that the request was made. Thus, claimant's petition for modification in the instant case is a valid request for additional compensation pursuant to Section 22 of the Act. *See generally Greathouse*, 146 F.3d 224, 32 BRBS 102(CRT); *Pettus*, 73 F.3d 523, 30 BRBS 6(CRT); *Meekins*, 34 BRBS 5. We therefore reject employer's contention that the June 3, 1997, letter is not a valid petition for modification.<sup>8</sup>

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<sup>7</sup>The claimant's request for modification in *Meekins* was, on its face, more substantial than those presented in *Pettus* and *Greathouse*, as it requested "additional compensation" and "modification of the previous award." Nevertheless the Board held that the administrative law judge properly found that the letter was an anticipatory filing inasmuch as it did not identify a particular disability but rather referenced all four types of disability awards and did not make a claim for a specific type of benefits for a specific time. 34 BRBS at 8. Significantly, the *Meekins* letter also explicitly stated it was not a request for an informal conference, which supports the conclusion that it was not a claim for current benefits.

<sup>8</sup>Our holding obviates the need to specifically address the administrative law judge's finding that the initial petition for modification, at least insofar as it raised the issue of disability due to anticipated surgery, is invalid.

Furthermore, as a timely petition for modification was filed on June 3, 1997, referencing temporary total and permanent partial disability benefits, the claim was open and pending at the time when claimant sustained the additional four days of temporary total disability at issue here. Claimant may amend a pending claim. *See* Arthur Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW §124.04[3] (2000); *U.S. Industries/ Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n. 7 (1982). Employer did not dispute the fact that claimant missed work during this period as a result of his work-related injury. Therefore, the administrative law judge's award of temporary total disability benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order on Modification and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge